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No. 22399 and 22399A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER and
SANDRA STAMPER,

Appellees.

OPENING BRIEF FOR APPELLANT

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OPENING BRIEF FOR APPELLANT

1. STATEMENT OF PLEADINGS AND FACTS

— JURISDICTION

This is an appeal taken from an interlocutory decree in admiralty, pursuant to 28 U.S.C.A. § 1292(a)(3).

The United States Constitution provides “The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction”. Article III, Section 2.

Jurisdiction in admiralty is exclusively Federal, the purpose being to keep the maritime law essentially uniform and harmonious.

The Lottawana, 88 U.S. 588 (1875) and many cases.

See *Benedict on Admiralty*, Volume 1, page 1.

Jurisdiction is specifically granted the district courts by 28 U.S.C.A., Section 1333.

Appellate jurisdiction in admiralty cases, in respect of both interlocutory and final decrees, has been conferred by Congress upon the Courts of Appeal.

28 U.S.C.A., Sections 1291, 1292.

The statutory limitation of liability law is found in 46 U.S.C.A., particularly Sections 182, 183, 185 and 188. Section 185 provides that a vessel owner may petition a district court of competent jurisdiction for limitation of liability.

Proceedings to limit liability are within the general maritime law and admiralty jurisdiction, and form an independent head of jurisdiction.

Richardson vs. Harmon, 222 U.S. 96 (1911)

Limitation of liability actions apply to all vessels used on lakes or rivers or in inland navigation.

46 U.S.C.A., Section 188

A decree denying a shipowner's petition to limit liability is appealable within the meaning of the Interlocutory Appeals Act.

Republic of France v. U.S., 290 F.2d 395 (1961
5th Circ.) cert. denied 369 U.S. 804 (1962)

This litigation resulted from the collision of two motor pleasure boats on Lake Havasu, a part of the Colorado River, and navigable waters of the United States. (F.13, T.76).¹

1. Legend F. Finding of Fact
 C. Conclusion of Law
 T. Clerk's Transcript of Record
 R. Reporter's Transcript of Proceedings
 Ex. Exhibit

Three guests on one of the boats were killed, and one was injured. Suits for damages were filed in the California courts against the owners of both boats. Each owner then filed a petition to limit liability in admiralty (T.2 and 10). State court suits filed on account of the deaths and injury were restrained and the claimants then filed claims in the limitation proceedings (T.25, 51, 56) and answers to the petitions (T.19, 37, 44). The petitions were then consolidated for trial (T.61).

An interlocutory decree was entered by the District Court on August 22, 1967 (T.79). Findings and conclusions on the issues of liability and petitioners' right to limit were filed August 3, 1967 (T.74). Appellee, Heiser, was held liable to the three death claimants (C. 1, T.77). Appellant, Pearson, although held not directly liable to the death claimants, was held liable to Heiser for one-half the total damages (C.2, T.78). Both Heiser and Pearson were also held severally liable to the injured claimant, appellee Stamper, and each liable to each other for one-half the Stamper damages (C.3, T.78).

The District Court found that neither petitioner was guilty of minor fault only (F.22, T.76) — in other words, the Court concluded the case was one of mutual fault. It is on this basis, as indicated in the Memorandum Decision filed March 10, 1967 (T.71), that the Court ordered each owner to indemnify the other for one-half his legal liability.

Prior to entry of the Interlocutory Decree the three death claims were settled and dismissed (T.83-94). This appeal involves petitioner Heiser and claimant Stamper as appellees.

Notice of Appeal was filed August 30, 1967 (T.81).

2. STATEMENT OF THE CASE

As stated this case is the result of a motor boat collision on Lake Havasu. Appellant, William A. Pearson, an American Airlines pilot, was the operator of a 13 foot outboard motor boat owned by himself. Appellee, Robert Heiser, was the operator of a 16 foot inboard motor boat which he owned. Claimant and Appellee, Sandra Stamper was a passenger seated in the front seat of Pearson's craft prior to the collision (T.75, R.36, 37, 660).

The collision occurred sometime after 9 p.m. on a dark, moonless, clear Friday night. During the preceding week Pearson and various of his American Airlines fellow employees had come to Lake Havasu for a recreational and water skiing outing. The make-up of the group had changed from day to day. Miss Stamper, a stewardess with American Airlines, had herself arrived on the Friday morning (T.75, R.659).

During the day, the group had gathered at a campsite on the Arizona side of Lake Havasu known as Three Dunes. It is located in an approximately northerly direction a little more than half a mile from Black Meadow Landing, a campground on the California side where the Pearson group had been staying (T.75).

Heiser was not a member of the American Airlines group but had joined them on the afternoon of May 21 and, after leaving for a short time, had returned later in the evening. By this time, all of the Pearson group had stopped water skiing (R.208).

As the sun set and the wind came up, the group decided to break its daycamp on the Arizona side and return to Black Meadow Landing. Although all of the group had originally gone over to Arizona on several trips of the Pearson boat, Heiser volunteered the use of his boat

to split up the people and the equipment so that Pearson would not have to return to Arizona for a second trip (R.208). Three girls, Miss Stamper, Katherine Kelley and Nancy Van Horne, got in the front seat of Pearson's craft with him. Seated on the stern seat was John Blaney (Exhibit P43). Some water skiing gear and an ice chest were also loaded in Pearson's boat. It left the Arizona side first, headed for California (T.75).

Heiser's boat followed with himself and William Cherbak seated in the front seat. Gayle Schonning was standing between the front and the back seat leaning on the motor housing, and Miss Penny Hicks was on the back seat. (R.208, 209). The steering wheel of Heiser's boat was on the right side. Pearson's steering wheel was on the left side. Each operator was behind his own steering wheel. The Pearson boat was travelling at about 20 mph. Shortly after it departed from Three Dunes, the Heiser boat passed travelling at about 30 mph. Both boats were then headed directly for Black Meadow Landing (T.75, 76).

Having passed the Pearson boat, Heiser continued directly to the vicinity of the beach at Black Meadow Landing. Meantime, when Pearson was about halfway across the Lake, Blaney's hat blew off. Pearson then turned on a reverse course and slowed down while those on board looked for Blaney's hat (T.76).

They had no luck in finding the hat. After a minute or so Pearson again turned and headed back toward the lights at Black Meadow Landing continuing at slow speed. The Court found that speed of the Pearson boat was "Safe and reasonable if Pearson was and had been maintaining a proper lookout" (T.76). Pearson estimated this slow speed to be 2 to 3 mph (R.49, 50, 82, 144).

When the Heiser boat neared Black Meadow Landing, those aboard looked back at Pearson's lights and concluded the Pearson boat was dead in the water or turning slowly. Schonning suggested the boat might be in some difficulty and Heiser turned his boat, accelerated, and proceeded toward the Pearson lights at a speed which reached about 20-23 mph with the intention of rendering assistance should it be needed (T.76).

Within approximately one minute after Heiser had turned and headed toward Pearson's lights the two boats came into collision. The Heiser boat struck Pearson a short distance aft of the bow on the starboard side. The angle of impact the Court found to be between 10° and 30° on the starboard bow of Pearson's boat. The Heiser boat drove up and over the Pearson boat which sank almost immediately (T.76). Three passengers on the Pearson boat, namely, Nancy Van Horne, Katherine Kelley and John Blaney, were killed. Miss Stamper, the fourth passenger, suffered personal injuries. Pearson was only slightly injured.

The Court found the collision occurred at a point approximately 900 to 1,000 ft. north of the beach at Black Meadow Landing off a peninsula or point of land jutting out in a northerly direction from the eastern edge of Black Meadow Landing. The area of collision was indicated by various witnesses on a chart of the area before the Court (Ex. H1).

The Court found (T.77) that the running lights and stern lights of both boats were fully operating and were lighted at all times prior to the collision. (The Court did not find specifically that the lights of the Heiser boat were not obscured and could have been seen by those on the Pearson boat).

The Court found that neither boat operator saw the other boat or its lights after the turns were made before the collision. The Court further found that Heiser operated his boat on a course headed in a general direction toward the lights of the Pearson boat in darkness with knowledge that the Pearson boat was ahead and without keeping the Pearson boat lights in view (T.77).

The Court found that Heiser was negligent in failing to keep a proper lookout and that such failure was a proximate cause of the collision (T.77). The Court likewise found Pearson negligent in failing to keep a proper lookout (T.77) and that this was also a proximate cause of the collision (T.77).

The questions involved and the issues raised will be shown in the Specification of Errors to follow.

3. SPECIFICATION OF ERRORS

The District Court made several fundamental errors. These were: first, in concluding that Pearson could have and should have seen the lights of Heiser's boat during the very short time involved and was negligent because he did not; second, in concluding that if Pearson had seen the Heiser boat lights he could have and should have taken unilateral action which would have avoided collision; third, in concluding that this was not a situation in which the admiralty rule of major vs. minor fault should be applied.

Even accepting the Court's finding that Pearson was negligent, we submit the Court erred in concluding that Pearson's failure to see Heiser was a proximate cause of the collision. The *proximate* cause was Heiser's great negligence in the face of known perils, which fully accounts for the collision.

These errors resulted from imposing a standard of care and duty on Pearson far greater than should have been applicable under the “reasonable man” legal concept in the circumstances. Also involved is failure to observe the fact that had Pearson seen the Heiser boat lights the situation would nevertheless have been one of “in extremis”. There is also involved failure to give due consideration to the required burden of proof on Heiser and the other claimants against Pearson in a limitation of liability proceeding.

The errors made by the District Court are stated in the Brief Statement of Points on which appellant intends to rely (T. 110-112). The essential errors, restated, are these:

1. The evidence does not support the finding that petitioner Pearson was negligent in failing to keep a proper lookout.
2. The evidence does not support the finding that negligence by petitioner Pearson was a proximate cause of the collision.
3. The evidence does not support the finding that fault by petitioner Pearson was not a minor fault.
4. The findings and Interlocutory Decree impose an unreasonable burden of duty and standard of care upon petitioner Pearson.
5. The evidence clearly established gross negligence and recklessness by petitioner Heiser, who should have been held solely at fault for the collision.
6. The court should have applied the well-established major and minor fault admiralty rule and held petitioner Heiser solely at fault for the collision because his negligence was major and sufficient to fully account for the collision.

7. The findings and Interlocutory Decree are based solely upon the inference and conclusion that failure to see the lights of the Heiser boat constituted negligence which was more than minor fault negligence in comparison with the gross negligence of Heiser and fails to give proper consideration to:

(a) The conditions existing at the time and place of collision;

(b) The difficulty presented a lookout on the Pearson boat to see the lights of the Heiser boat;

(c) The compounding of such difficulty by shore lights in the background;

(d) The fact that the white stern light on the Heiser boat may have been obscured by persons on board and the red and green single fixture running lights may have been obscured by the angle of the bow of the Heiser boat which came up in the water during the approach;

(e) The short interval of time during which the Heiser boat approached the Pearson boat over a short distance on a collision course; and

(f) The difficulty and uncertainty which would have attended any decision as to action to alter course "in extremis" had Pearson seen the lights of the Heiser boat approaching, anticipated danger of collision and endeavored to avoid collision by some steering maneuver.

(g) The degree or extent of negligence sufficient to constitute proximate cause.

We will discuss these errors.

4. ARGUMENT

We will summarize each argument briefly as a head note to each point discussed.

A. Heiser's glaring negligence alone caused the accident.

The Court erred in not holding that Heiser's reckless, careless and negligent operation of his boat, was so substantial that he was solely at fault for the collision.

Heiser failed to maintain any lookout whatsoever after turning and heading toward the lights of the Pearson boat and did not watch or see the lights after he headed toward it (F.19, T.77). Heiser created the entire danger of collision. He operated his boat on a collision course headed in a general direction toward the lights of the Pearson boat in darkness with knowledge the Pearson boat was ahead and without keeping the boat lights in view (F. 19, T.77). Heiser misestimated the distance and came upon the Pearson boat much quicker than he thought he would (F.19, T.77, R.259). These faults were so great they established sole fault on Heiser by application of general principles of admiralty law.

When Heiser decided not to beach his boat as intended and as Pearson expected, but to go back out into the lake to see whether anything was wrong aboard the Pearson boat, he testified he turned pretty quickly, putting his wheel hard over, speeded up (R.223); did not thereafter see the lights, continued to sit on his seat and did not stand up (R.225); did not ask anyone else to keep a lookout (R.226); lost visibility of the lights (R.227, 248), relied upon his judgment where the Pearson boat was (R.241), estimated his speed at 18 to 22 mph (R.242); proceeded a comparatively short time and reached Pearson much quicker that he thought he would (R.259).

Heiser was going back with a good samaritan motive to see if help was needed but this does not excuse his complete neglect of lookout, particularly when he was deliberately heading directly where he judged Pearson to be and trying to get there quickly.

We respectfully urge that Heiser's negligence was sufficient to hold him fully responsible for the collision, regardless whether Pearson did or did not see the Heiser boat lights and tried to avoid the danger Heiser alone created.

The evidence that Heiser's bow came up was clear. It did obscure Heiser's vision. This made it inexcusable of Heiser to fail to stand up or make some effort to try to watch Pearson's lights.

Heiser testified the bow of his boat rises and stays up until the boat planes or "comes up on the step," at a speed of 20 to 23 mph depending on weight and placement of weight on board (R. 196, 197). He also testified in his deposition that he lost visibility of the lights at the time the bow came up (R. 248). Just before the trial he amended his deposition and stated he did not recall seeing the lights after he first came into the beach (R. 248). In the deposition he confirmed his bow was between him and the lights of the Pearson boat:

"That's what happened". (R. 249).

Schonning, one of the airline pilots on Pearson's boat, confirmed that the bow came up after they came out of the turn (R.270). Cherbak, the other pilot, also confirmed the bow "naturally" went up (R. 307) and said the lights disappeared when Heiser applied power (R. 313).

Charles Sinclair, who testified as a technical witness in behalf of Pearson, gave evidence consistent with the foregoing. He stated that during night runs made at Lake San Marcos, the driver of the test Chris-Craft was required to half stand in his driver's seat in order to see his steering point, a flashlight fixed approximately 3 ft. above the water level (R. 528). The tests (see Ex. P. 43) made by Pearson's expert, Arthur DeFever, a naval and marine architect and marine surveyor, were likewise

Pearson cannot be faulted under the conventional rules for crossing or meeting situations (e.g. Art. 18, 19, 21 or 22 of the Rules of the Road). Heiser alone created the dangerous situation an extremely short time before the collision. The navigating rules presuppose approaching vessels are in sight of one another and can check each other's position and course.

Lind vs. United States (2d Cir. 1946) 156 F.2d 231, at 233;

Borcich vs. Ancich (9th Cir. 1951) 191 F.2d 392 (and cases cited at n.4).

While Heiser was proceeding *away from* Pearson, no relation between them existed. There was no "need for precaution". Only after Heiser turned did a "risk of collision" arise and then only because of the course chosen by Heiser and the special circumstances. At *that* point Heiser *knew* he was headed toward Pearson. Pearson had no reason to suspect Heiser was approaching directly toward him at high speed, without watching, and would run him down. The situation was a "special circumstance", with Heiser the burdened vessel; he created the risk of collision; he, not Pearson, was under the duty to take precautions necessary to avoid it.

The District Court decision that Pearson was negligent is based upon the fact that Pearson did not see the lights of the Heiser boat. Failure to keep a proper lookout would be a contributing factor in the collision only if a reasonable standard of care would demand that a proper lookout aboard the Pearson boat could and should have seen Heiser's lights; could and should have determined in the time available that a boat was approaching and there was danger of collision; and could and should have taken some action which would have avoided the accident.

We will discuss the evidence which we submit proves:

(a) Pearson was keeping a reasonable lookout under the circumstances during the short period Heiser headed on a course towards him prior to the collision;

(b) the most vigilant lookout might not have seen Heiser's lights because they were small, difficult to pick up against the lights on shore, and the small running lights may well have been obscured by the bow, and the stern light by Schonning;

(c) mere failure to see lights of a small boat on a dark night, whose high speed on a short approach is not reasonably to be anticipated, does not constitute negligence; and

(d) It is highly speculative to assume Pearson could have, and should have, unilaterally avoided collision had he seen Heiser's lights within a reasonable time after Heiser headed toward him on a collision course.

The District Court concluded, *solely by inference from Pearson's frank testimony he did not see Heiser's lights*, that he was not keeping a proper lookout. This is, of course, contrary to Pearson's testimony. Initially, on direct, he testified (R. 52):

“Q Tell the Court what you were doing so far as looking out is concerned after you had headed back on your original course?

A Well, I was looking for this red light, which was on the end of the point, and I can for some reason still remember the silhouette of the hill, and I can't recall the red light but I know I was looking for it, and . . .

Q Did you look toward Black Meadow Landing?

A Yes, sir, I was looking ahead and to the left, and I don't recall looking way off to the right, but I know I was scanning across from ahead of the boat back to the left and probably behind on the left,

trying to get sight of this red light that I knew was there.

Q What do you mean by the word "scanning"?

A Well, I was just moving my head around from one direction to the other".

In answer to additional questions, both on direct and under long cross-examination, Pearson testified further: That he was looking *where they were going* which was the camp area (R.54); that he was concerned with the point of land on his left and could see *where they were going because of the lights* although the point of land was obscured (R.55); that as he proceeded in toward the beach he was *scanning ahead looking where they were going* and that his main point of interest was trying to keep from running aground and *keep heading in the right direction* (R.59-60); that there were many background lights (R.129); that *he saw the lights where they were going* but no light identified as an approaching boat (R.60); that his concentration was more on the left because he was concerned about the point of land (R.84); that Heiser's boat had blended in with the lights in the background and was out of the way (R.133); that he was *looking around* and also looking down (R.142); that he was concerned to *get lined up toward where they were going* and watching the point of land (R.143); that he was *looking ahead to the beach and scanning for other boats* (R.143); that he was concerned with the point of land on the left which was only about 100 feet distant with its beach line hard to make out (R.147-148); that he was *primarily concerned with getting back to the landing area* (R.165); that among other things he was looking for the hat (R.165); that *he was looking where they were going* (R.169); that he was not primarily concerned with the hat but was more concerned with the point of land and *where they were heading* (R.177).

Nevertheless, apparently, rejecting this testimony, the Court found that at the time of and prior to the collision Pearson “was looking for Blaney’s hat and his attention was directed predominantly to his left and he was not keeping a proper lookout” (F.16, R.76).

The evidence introduced on time, speed and distance emphasizes the error made by the Court in concluding Pearson was negligent simply because he did not see and avoid the Heiser boat lights.

The evidence proved Heiser accelerated. Heiser said he gradually increased power after he turned (R.222, 263) and that he speeded up (R.222). Schonning said Heiser accelerated as he came out of the turn and estimated speed somewhere around 20 to 25 mph at the time of collision (R.270). Cherbak said he didn’t know the speed; then estimated 15 to 20 mph (R.303). He confirmed Heiser applied power after the turn (R.313). Bird, on the beach, said Heiser accelerated up to 20 or 25 mph (R.690, 691).

Estimates of time elapsed from Heiser’s turn until collision by those who could make any estimate were as follows:

Cherbak thought it was a very short period of time but it would be a pure guess and did not estimate it (R.301).

Schonning estimated the time as under 30 seconds — “30 seconds or less” (R.295).

Bird thought it was something under a minute (R.690).

The Court found it was “approximately a minute” (T.76).

Accepting the District Court’s findings as to the speed of the Heiser boat (20-23 mph) (T.76) and the distance

of the point of collision from Black Meadow beach (900 to 1,000 feet) (T.76) makes it obvious the elapsed time after Heiser completed his turn and headed toward Pearson's lights to the moment of impact must have been on the short side of the Court's finding that the time was "approximately one minute". (T.76). At 23 mph a boat travels 2024 feet in 60 seconds. It will cover 900 feet in about 27 seconds and 1,000 feet in about 30 seconds. At 20 mph a boat travels 1,760 feet in one minute and would cover 900 feet in about 32 seconds and 1,000 feet in about 35 seconds.

Heiser was not headed toward Pearson or on an approaching course until his turn. Witnesses estimated he was 30 to 50 feet off the beach at this time (T.268, 688). Therefore, he was on an approaching course for a distance somewhat less than the distance from the beach to the point of collision.

During the time Heiser was approaching Pearson was also moving toward him at slow speed, as the Court found (T.76); 2 to 3 mph according to Pearson (R.49, 50). At 3 mph a boat travels 264 feet in one minute; at 2 mph 176 feet in one minute.

It is unreasonable to require any boat owner to maintain a lookout which will insure and guarantee, within such a short period of time, that a boat's lights will be seen, the course of the boat determined, the danger of collision realized and some proper action taken to avoid collision. The standard of care imposed by the District Court further required anticipation by Pearson that the driver of an approaching boat might not be watching and would not make any effort to steer clear, which Heiser could easily have done.

We most respectfully repeat this imposed an unreasonable standard of care and duty to claimants. A lookout

has more than the duty only to look ahead. It was not *negligent* to look for the lost hat. Pearson was concerned about going aground in the dark on the unlighted point of land to the left and cannot be faulted for looking for it among other things.

The District Court concluded, despite Pearson's testimony, that the mere fact he did not see the Heiser boat lights and avoid the collision made imminent by Heiser's clear negligence also constituted negligence. This was clearly erroneous in the light of the other findings of fact.

A boat can come from any direction. Running lights of motor boats are small and difficult to see at best. The type of single running light on the Heiser boat is in evidence (Ex. H.2). The lights on shore behind Heiser's boat increased the difficulty. Even after they are seen, running lights must be evaluated to determine the course of the boat and whether it is approaching, crossing or headed in some other direction. The location of the white stern light in relation to the colored running lights is quite important in determining a boat's course. Any navigator appreciates that it takes time to determine, after sighting running lights and a stern light, whether a vessel is on an approaching or a crossing course and, particularly, whether it will *maintain* that course. Danger of collision cannot be known until the bearing of an approaching vessel is observed for an appreciable time and the course determined.

A substantial part of the trial and many exhibits introduced pertained to technical testimony, both oral, documentary and visual, on whether the *bow* lights of the Heiser craft could be seen by those in Pearson's boat.

Pearson first introduced the expert witness statement of Arthur DeFever (Ex. P.43). This was obtained following discovery deposition testimony which suggested Heiser's lights were obscured. It offered a possible ex-

planation of the fact that Pearson did not see the lights (nor did Miss Stamper, seated in the right front seat of the Pearson boat (R. 663-664)).

Testimony by Captain Wetmore and by Poe, the Chris-Craft engineer, created a conflict in two points only: First, the angle of inclination which a Chris-Craft of the type operated by Heiser would have achieved at the critical hull speeds and, second, whether the bow running lights of the Heiser craft would have been visible to an observer low on the water at those speeds (R. 546, 574, Ex. H.15, H.18). Very significantly, the testimony presented did not refute the evidence that Heiser's view of Pearson was obscured by the Heiser bow or that Heiser's white stern light was obscured either by Heiser's bow or Schonning's body.

The latter is of critical significance in understanding the burden the Court placed upon Pearson. Mere failure to observe an approaching boat is no fault if it is impossible to *evaluate* the course and maneuvering of the boat before collision. With the white light invisible and with the bow light alternating between red and green, there was no way in which the most experienced mariner could have determined the course of Heiser as he approached — over a period undoubtedly less than one minute — and taken correct evasive action. Again significantly, no one at trial suggested what evasive action Pearson should have taken. No evidence was offered that *any* evasive action could have been effective.

The two motion pictures viewed by the Court (Exs. P.51 and H.19) confirmed the difficulty, first, in perception, and, if perceived, in evaluation, presented to Pearson. The DeFever movie showed Heiser's white light was obliterated during runs at rpm within the critical speed range. Captain Wetmore's movie showed that the white light was obscured "sporadically" on each run. Captain

Wetmore confirmed this on cross-examination (R. 639-640).

The “movie” boats were only similar to Heiser’s, not identical. Captain Wetmore’s experimental runs were made without anyone standing behind the front seat in the position occupied by Schonning. Hence the possibility of obliteration of the white light by a passenger did not occur during the Wetmore test runs, but the light nevertheless was obscured part of the time.

Pearson’s failure to see and evade Heiser’s boat was not proof his lookout was inadequate. The standard demanded of a lookout is based upon reason, not impossible perfection.

A good discussion of lookout is contained in *Stevens v. United States Lines Co.* (1st Cir. 1951) 187 F.2d 670, 674:

“The lookout rule embodied in Article 29 of the Inland Rules quoted in the margin is broad and general in its terms. It does not spell out what constitutes a ‘proper lookout’ or even under what circumstances one must be kept. It leaves these matters at large to be determined by reference to the ‘ordinary practice of seamen’ or to the ‘special circumstances of the case.’ That is to say, the statute establishes a standard of conduct by which to measure the behavior of mariners with respect to maintaining a lookout under the various circumstances which they may encounter, not a specific rule, or series of rules, for particular specified situations. In keeping with the statutory scheme we shall not attempt to put a gloss upon the statute by laying down a rigid legal rule of general application with respect to what constitutes a ‘proper lookout’ in a particular situation, or as to the specific circumstances under which some sort of lookout must be kept. Instead of tailoring hard and fast legal rules to fit specific states

of fact as they arise in their infinite variety in these cases, we think it preferable to state as a general proposition that the Article in question requires a lookout in every direction from which danger may reasonably be expected to arise, and that the quality and diligence of the lookout required depends upon the degree, and imminence of the danger reasonably to be anticipated."

In *Lind vs. United States* (2nd Cir. 1946) 156 F.2d 231, the court discussed the matter of the other vessel's lookout and the problem of what action to take:

"The considerations which lie behind these rules seem to us to apply to the case at bar, but to reverse the respective duties. It was substantially impossible for the 'Mary' to 'keep out of the way' of the 'Doubleday', for, not only could she not have made her out very far ahead; but if she had, she could not have learned the 'Doubleday's' course and speed. Moreover, even though Olsen had been at the wheel as he should have been, he would have known that for many minutes and over a distance of three or four miles, his vessel could have been seen by any approaching ship; and he would have been justified in supposing that such a ship would shape her course to avoid him, counting upon the fact that he could not see her or do anything whatever to avoid her until she was near at hand. Moreover, he would have known that even when he did make her out, any act of avoidance by him would at best have been blind-man's buff."

Oriental Trading & Transport Co. Ltd. vs. Gulf Oil Corp. (2nd Cir. 1949) 173 F.2d 108 is another example of how confused and difficult the choices of the boat operator can be.

Another case, *Compania De Maderas vs. The QUEENSTON HEIGHTS*, (5th Cir. 1955) 220 F.2d 120, also holds, contrary to the finding of the Trial Court whose decision was modified, that failure to have a lookout on the bow was excused where there was gross negligence of the other vessel.

C. The admiralty major and minor fault rules should have been applied.

The District Court erred, as a matter of law, in concluding negligence by Pearson was a proximate cause of the collision because under the facts found by the Court the major and minor fault rule, well established in admiralty cases, should have been found applicable in view of Heiser's gross and inexcusable active fault in comparison with the doubtful and at all events slight passive fault of Pearson.

It would be difficult to find an admiralty collision case in which the facts more strongly call for application of the "major-minor fault rule." We have clear, conceded active fault by Heiser. We have only *inference* of passive fault by Pearson, because he did not see the lights. There is also the *further incorrect inference* that he was not keeping a proper lookout because he was also looking for Blaney's hat and his attention was directed predominantly to his left (to avoid grounding on the point of land).

Griffin, the leading American authority on Collision, explains the major-minor fault rule in this way at pages 505 and 506:

"It sometimes happens that a collision was due to the gross and inexcusable fault of one vessel, whereas the other's fault was doubtful and, at all events, slight. Under such circumstances, it may be unjust to divide the damages equally, as the American law

requires in cases where both are to blame. Of course, when the other vessel actually was guilty of substantial contributing fault, both vessels must be held; but, when the fault of one was flagrant and was the real cause of the collision, the courts are inclined to hold either (1) that they will not inquire too closely into the conduct of the other and that any doubts will be resolved in her favor; or (2) that her fault was not contributory; or (3) that a slight fault will be wholly disregarded. * * *

If, as the result of *all* the evidence, it appears that the real cause of collision was the grave misconduct of one vessel, and that the fault of the other was doubtful or very slight the principle under discussion may be applied. If the faults of one vessel "sufficiently account for the collision" the court, before condemning the other, "should be satisfied that her fault contributed to the accident" (the *Pallanza*, C.C.A.2, 189 Fed.43 (1911)). This is merely an effort to attain justice by placing full liability on a flagrant wrongdoer. *In such cases, there must be proof that the other vessel was guilty of substantial contributing fault before the damages will be divided.* [Emphasis added]

A leading case on the doctrine of the major-minor fault rule is *CITY OF NEW YORK* (1893) 147 U.S. 72. The District Court held both vessels at fault in a collision case. The Circuit Court reversed holding the *CITY OF NEW YORK* solely at fault. The Supreme Court affirmed and held at page 85:

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is

established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.”

See also: *White Stack Towing Corp. vs. Bethlehem Steel Co.* (4th Cir. 1960) 279 F.2d 419.

The LUDVIG HOLBERG (1895) 157 U.S. 60;

The VICTORY (1897) 168 U.S. 410;

Linde-Griffith Constr. Co. vs. The AUTHENTIC (2d Cir. 1954) 210 F.2d 757.

We submit this was surely a major-minor fault situation.

D. The Burden of Proof on claimants was not given Proper Weight.

The District Court erred in failing to give appropriate consideration to the burden of proof on Heiser and the other claimants to establish that fault on Pearson's part which contributed actively to the collision.

With respect to the burden of proof on the issue of liability in a limitation proceeding, the law is settled that claimants were required to prove Pearson negligent.

“In the admiralty proceeding in which a ship-owner seeks to exonerate himself from liability or to limit his liability, the burden of proving negligence or unseaworthiness rests upon the claimant.”

Walston v. Lambertsen (9th Cir. 1965) 349 F.2d 660, 663.

This is the first question to be decided in limitation proceedings.

Petition of Vest (N.D. Cal. 1953), 116 F.Supp. 901.

Several lines of authority dealing with the consequences of unequal fault in collision involve the question of burden of proof. See Griffin, *Collision*, 505-9. Because the fault of Heiser is so clearly established, the burden cast upon him and the other claimants was a heavy two-pronged obligation. To summarize our position on this point:

a. Claimants were required to establish fault on Pearson's part by clear evidence not by *inference*. Yet the District Court inferred from the mere fact that Pearson did not see Heiser's lights and manage to get out of Heiser's way his lookout was defective and constituted proximate cause negligence.

b. Claimants had to establish by equally clear evidence that such fault contributed *substantially* to the collision.

c. Both these issues should have been resolved against Pearson only if the evidence was beyond reasonable doubt.

d. The District Court failed to properly recognize this burden on claimants asserting damages against Pearson.

The question of fault by Pearson was one for claimants to establish, not for Pearson to disprove. Where as here, the positive fault of one vessel (Heiser) is clear, evidence indicating negative fault of the other (Pearson) must be clear and convincing.

The CITY OF NEW YORK (supra).

“The SEEGER has the burden of proving the WAIPAWA’s fault, and, since she was herself grossly at fault, that burden is more than ordinarily heavy.”

United States vs. Shaw, Saville & Albion Co., Ltd.
(2nd Cir. 1949) 178 F.2d 849, 851.

Compania Nacional De Navegacao Casteiro Patrimonio vs. Cabins Tanker Industries, Inc. (4th Cir. 1961) 285 F.2d 592, 594.

The STADACONA (6th Cir. 1917) 242 F. 624.

We submit that here the evidence that Pearson did not see Heiser’s lights in the short time they might have been observable did no more than raise a question whether this may have been due to improper lookout.

The District Court must have decided that the fact that Pearson did not see the lights of the Heiser boat raised a presumption of negligence on the theory of “Failure to see what ought to be seen.” This overlooks the circumstances and the positive rather than negative facts in this case. Specifically these included: Pearson’s navigating problem because of the point of land and the lost hat; Heiser’s sudden reversal of course completely unexpected by Pearson; the short time and distance Heiser travelled on collision course; the difficulty of seeing and evaluating lights if seen; the possible effect of background lights on shore; the darkness on the lake; the possibility that Heiser’s lights may have been obscured; the uncertainty whether Pearson could have taken action to avoid collision had he seen Heiser’s lights.

We submit these facts make the present case quite unlike those in which failure to see lights has been held to be negligence sufficient to be the proximate cause of a marine collision.

CONCLUSION

We urge that the facts found by the District Court do not warrant judgment, making Pearson, not only legally and monetarily liable, but also morally responsible, for these deaths and injury. This imposed an unreasonable and impractical duty and standard of care under the facts found, and upon which the judgment is based. This Court can correct the error.

The interlocutory decree should be reversed as to Pearson and modified so as to exonerate Petitioner-Appellant Pearson from liability to Appellee Stamper and from all indemnity obligations to Appellee Heiser, with costs to Pearson in all courts.

Respectfully submitted,

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APPENDIX

<u>Exhibits</u>	<u>Description</u>	<u>Off'd.</u>	<u>Iden.</u>	<u>Rec'd.</u>
P 1	Statement of expert qualifications of Arthur De Fever	319	10	319*
P 2	De Fever sketch, Heiser boat	319	10	319*
P 3	De Fever sketch, Heiser boat	319	10	319*
P 4	De Fever sketch, Heiser boat	319	10	319*
P 5	De Fever sketch, collision	319		319*
P 6	De Fever sketch, Pearson boat	319		319*
P 7	De Fever trial results	319		319*
P 8	De Fever photograph, Heiser boat	317	10	317
P 9	De Fever photograph, Heiser boat	317	10	317
P 10	De Fever photograph, Heiser boat	317	10	317
P 11	De Fever photograph, Heiser boat	317	10	317
P 12	De Fever photograph, Heiser boat	317	10	317
P 13	De Fever photograph, Heiser boat	317	10	317
P 14	De Fever photograph, Heiser boat	317	10	317
P 15	De Fever photograph, Heiser boat	317	10	317
P 16	De Fever photograph, Heiser boat	317	10	317
P 17	De Fever photograph, Heiser boat	317	10	317
P 18	De Fever photograph, Heiser boat	317	10	317
P 19	De Fever photograph, Heiser boat	317	10	317
P 20	De Fever photograph, Heiser boat	317	10	317
P 21	De Fever photograph, Heiser boat	317	10	317
P 22	De Fever photograph, Pearson boat	317	10	317

<u>Exhibits</u>	<u>Description</u>	<u>Off'd.</u>	<u>Iden.</u>	<u>Rec'd.</u>
P 23	De Fever photograph, Pearson boat	317	10	317
P 24	De Fever photograph, Pearson boat	317	10	317
P 25	De Fever photograph, Pearson boat	317	10	317
P 26	De Fever photograph, Pearson boat	317	10	317
P 27	De Fever photograph, Pearson boat	317	10	317
P 28	De Fever photograph, Pearson boat	317	10	317
P 29	De Fever photograph, Pearson boat	317	10	317
P 30	De Fever photograph, Pearson boat	317	10	317
P 31	De Fever photograph, Pearson boat	317	10	317
P 32	De Fever photograph, Pearson boat	317	10	317
P 33	De Fever photograph, Pearson boat	317	10	317
P 34	De Fever photograph, Pearson boat	317	10	317
P 35	Coast Guard photograph, Pearson boat	317	10	317
P 36	Coast Guard photograph, Pearson boat	317	10	317
P 37	Coast Guard photograph, Pearson boat	317	10	317
P 38	Coast Guard photograph, Pearson boat	317	10	317
P 39	Coast Guard photograph, Pearson boat	317	10	317
P 40	Aerial photograph of Black Meadow Landing	10	10	11
P 41	Chart prepared by Dept. of Interior Geological Survey, showing Lake Havasu	9	10	9
P 42	Chris Craft brochure (front page only)	199	10	200

<u>Exhibits</u>	<u>Description</u>	<u>Off'd.</u>	<u>Iden.</u>	<u>Rec'd.</u>
P 43	Statement of Arthur De Fever	319	318	319
P 44	Photograph of a Chris Craft used in De Fever tests	464	463	464
P 45	Photograph of motion picture camera	473	470	473
P 46	Photograph of one of De Fever daylight runs	471	471	472
P 47	Still picture of De Fever tests	473	473	477
P 48	Still picture of De Fever tests	473	473	477
P 49	Still picture of De Fever tests	473	473	477
P 50	Still picture of De Fever tests	473	473	477
P 51	De Fever motion picture film, night runs	490		580
H 1	Chart of Black Meadow Landing and Lake Havasu	10		11
H 2	Sample light	44	45	45
H 3	Pearson's Coast Guard testimony		63	
H 4	Pearson's boating accident report	191	191	191
H 5	Two sketches from Coast Guard record showing angle and point of collision that the boats came together	276	276	276
H 6	De Fever sketch		356	
H 7	De Fever sketch showing 8½° change in vessel angle would conceal Heiser's running lights	358	357	359
H 8	Photograph of Heiser boat taken out of water with buoy in the picture	400	399	
H 9	Sinclair raw notes of test measurements		440	
H 10	Heiser's invoice for purchase of boat	535	534	535
H 12	Photograph of Chris Craft device to measure angularity	562	541	562

<u>Exhibits</u>	<u>Description</u>	<u>Off'd.</u>	<u>Iden.</u>	<u>Rec'd.</u>
H 13	Photograph of Chris Craft device to measure angularity		541	
H 14	Photograph of Chris Craft device to measure angularity		541	
H 15	Chris Craft Corp. test sheet		545	559
H 18	Chris Craft Corp. test sheet	561	560	561
H 19	Wetmore motion picture film			
S A	Written statement of William Bird	707	707	708

*Exhibits P 1 through P 7 for identification were attached to and received as part of Exhibit P 43.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN C. McHose

Attorney

Nos. 22399 and 22399A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER, and SANDRA STAMPER,

Appellees.

Appeal From the United States District Court,
Central District of California.

BRIEF FOR APPELLEE ROBERT W. HEISER.

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BRIEF FOR APPELLEE ROBERT W. HEISER.

I.

Factual Statement.

In essence this suit involves a collision between two motorboats in the middle of a lake, at night, under conditions of unlimited visibility. It is unusual in that, although the lights of both boats were fully operative and functioning, neither operator appears to have seen the other boat in advance of the collision, or, indeed, at the time of the collision itself. The facts, briefly stated, are as follows:

Appellant Pearson and appellee Stamper were part of a group of American Airlines employees who had been engaged in water skiing and other recreational activities in the vicinity of Three Dunes Camp Ground on the Arizona shore of Lake Havasu, from the early morning hours of May 21, 1965, until shortly after dusk [F.

3].* They were joined that afternoon by appellee Heiser who, when the time came to leave, offered the use of his boat to carry part of the group back to their camp near Black Meadow Landing, on the California side of the lake, roughly three-quarters of a mile (3,750 feet) away [F. 4, 5]. A stewardess, Penny Hicks, and two pilots, Messrs. Cherbak and Schonning, joined Heiser in his boat. The rest of the party, consisting of Misses Van Horne, Kelley and Stamper and Mr. Blaney, left the Arizona shore in Mr. Pearson's boat [F. 5].

Mr. Pearson left first, sitting at the wheel of his boat with the three girls sitting to his right in the front seat [F. 6, R. 37]. Mr. Blaney was in the back. Shortly, thereafter, the Heiser boat passed it en route to Black Meadow Landing. Mr. Heiser sat at the right side of the front seat behind the wheel with Mr. Cherbak to his left [R. 297]. Mr. Schonning was crouching near the engine box behind them half leaning on the front seat [R. 265]. Miss Hicks was asleep on the rear seat [R. 210]. Having passed the Pearson outboard, the Heiser boat continued on to the immediate vicinity of the beach at Black Meadow Landing and was preparing to land when, as will be seen below, it turned about and came out again.

In the interim, when the Pearson boat was perhaps one-half of the way across, Mr. Blaney complained that he had lost his hat [F. 10]. Mr. Pearson turned his boat about and proceeded on a reverse course away from Black Meadow Landing with those on board looking for the hat [F. 10]. After some distance, he

*Legend:

- F. Finding Fact
- R. Reporter's Transcript of Proceedings
- C. Conclusion of Law
- P. Br. Pearson Brief
- Ex. Exhibit

made another 180° turn and proceeded back on his original course towards Black Meadow Landing. Those on board continued to look for the hat [F. 10, R. 84-86].

In the meantime, the occupants of the Heiser boat, at Black Meadow Landing, observed that the Pearson boat was not behind them where they had expected to see it. Instead, it appeared to the two pilots and to Mr. Heiser to be in the middle of the lake, either dead in the water or turning very slowly [F. 11]. At that point, Messrs. Schonning and Cherbak expressed concern for their friends, and Mr. Heiser turned his boat about and proceeded out to render assistance. He accelerated gradually [R. 222] on a direct course heading slightly to the rear of the point where he had last seen Pearson's lights [R. 227], ultimately reaching a speed of about 20-23 m.p.h. [F. 11]. Approximately one minute after the Heiser boat left the beach, at a point approximately 900 to 1,000 feet north of Black Meadow Landing, the two boats came into collision [F. 12, 13].

Three passengers in the Pearson boat, Misses Van Horne and Kelley and Mr. Blaney were killed. Appellee Stamper suffered serious personal injuries. Pearson and Heiser received only slight injuries [F. 14].

The court found that the Heiser boat had approached Pearson's from a direction of between 10 to 30 degrees to Pearson's right [F. 16]. It found further that the running lights and stern light of Heiser's boat were fully operative and lighted [F. 15]; that at no time after turning his boat to search for the hat, up to and including the time of collision, did Pearson see the Heiser boat or its lights [F. 17]; and, finally, that at the time of, and prior to, the collision Pearson's attention

was directed predominantly to his left and he was not keeping a proper lookout [F. 16].

II.

The Court's Finding That Appellant Failed to Keep a Proper Lookout Was Based on Substantial Evidence.

A brief review of appellant's specification of errors and the arguments advanced to support them makes it clear, we believe, that this appeal really involves but a single question: whether or not the trial court's finding that Mr. Pearson failed to keep a proper lookout was clearly erroneous. We will address ourselves to that question at the outset, therefore. The various other specified "errors" will be discussed *infra* at p. 10, *et seq.*

The most striking feature of this case, as we have noted, is that two boats, both properly lit, collided at night under conditions of unrestricted visibility, and that at no time during the period when both boats were on converging courses did the operator of either see the other boat. The conclusion which flows from these facts is obvious. Judge Learned Hand stated it in *The Salutation*, 79 F. 2d 609 (2d Cir. 1935), in these terms:

"[I]t is fairly apparent that for two vessels to get so close on a clear night, without seeing each other, is alone strong antecedent reason for supposing that both must have been careless."

Id. at 611.

In sum, when one fails to see what is there to be seen, and which one has a duty to look for, it is a fair conclusion, indeed the only conclusion absent some satisfactory explanation, that the person was not keeping a proper lookout.

This fact was not lost to appellant's counsel who, at the outset of trial, undertook to establish "conclusively"

that there *was* an explanation [R. 19]. The explanation offered was that the lights on Heiser's boat were so situated that, when the bow rose in the water as power was applied on the run out from Black Meadow Landing, they became invisible to those in the Pearson boat. Appellant's evidence came in the form of testimony from two marine surveyors, Mr. Arthur DeFever and his assistant, Mr. Sinclair. These gentlemen testified in substance that when the bow of the Heiser boat, a 1964 Chris-Craft, rose to an angle of 8.5° from horizontal, the running lights (but not the stern light) were screened from view to those ahead by the projection of the stem of the boat [R. 356, 317 *et. seq.*, Ex. P. 43].

During examination it developed that the experiments upon which this testimony was based were performed in a 1963 Chris Craft on the waters of San Diego Bay, with the 186-pound Mr. Sinclair sitting in the rear seat to simulate the weight of Miss Hicks¹ [R. 354, 348, 376]. The instruments used were a carpenter's level, a plastic ruler, and a package of Wrigley's Spearmint gum; the latter for purposes of determining the angle of inclination of the boat at rest [R. 344, 435]. Runs were made in two directions at various speeds and the angle of inclination measured. The procedure followed was for Mr. Sinclair to hold the carpenter's level in a horizontal plane with one end resting on the boat's exterior decking, while with the other hand he held the plastic rule in an effort to measure the distance from the free end of the level to the deck with an accuracy of .01 inch [R. 436, 439 *et seq.*]. It was conceded on cross-examination that the runs were not repeated in order to verify the findings by obtain-

¹Miss Hicks weighed approximately 110 pounds [R. 376, 377].

ing reproducible results [R. 449]. When the measurements were completed, the data was plotted as a curve on a graph from which Mr. DeFever was able to determine that at speeds of from 15 to 20 m.p.h. the angle of inclination exceeded 8.5° [Ex. P. 43 at 18, 7]. It was conceded by Mr. Sinclair on cross-examination that they had not obtained sufficient data points to verify the curve as plotted [R. 456-458].

Rebuttal evidence took several forms. Mr. Richard Wetmore, also a marine surveyor, testified that a 1964 Chris Craft identical to Mr. Heiser's, with the weight and location of Mr. Heiser's passengers duplicated exactly, was operated at various speeds outbound from Black Meadow Landing at Lake Havasu [R. 570 *et seq.*]. Motion pictures were taken from an outboard motorboat similar to Mr. Pearson's located at approximately the point of collision. They corroborated Mr. Wetmore's testimony that the Chris Craft's running lights were visible at all speeds.

Mr. James Poe, an engineer from the Christ Craft Corporation, testified to the following:

(1) That all Chris Craft boats undergo extensive testing prior to being placed on the market [R. 537];

(2) That among these tests was one designed to measure a boat's maximum angle of inclination at various speeds [R. 537];

(3) That in 1963 and 1964 such tests were performed with boats identical to Mr. Heiser's using a measuring device with verified accuracy to within 3.3/60th of a degree [R. 537, 540, 544]; [photographs of which were introduced as Exs. H. 11 - H. 14].

(4) That these tests established that the maximum inclination recorded at any speed was $5^{\circ} 30'$ [R. 546]. (Mr. DeFever testified that the lights would be visible up to an angle of 8.5° [R. 317 *et seq.*; Ex. P. 43]). Records prepared at the time the tests were performed were introduced as respondent's Exhibits H-15.

Finally, there was the testimony of Chief Petty Officer Bandel, who had served continuously from before the collision to the date of trial as officer in charge of the Coast Guard detachment responsible for the Lake Havasu area. Chief Bandel gave testimony relating to the point of collision, and testified further that in his experience there was sufficient illumination from the lights of Black Meadow Landing *alone* for persons in a boat located at the point of collision to see another boat approaching from shore [R. 401].

We submit, therefore, that there was ample evidence from which to conclude that the lights of the Heiser boat should have been visible to Mr. Pearson prior to the collision and, indeed, that the Heiser boat should have been visible even if it had not been lighted.

So, again, the question must be asked: why did Mr. Pearson not see the Heiser boat prior to the collision? The best answer, we submit, is to be found in Mr. Pearson's own testimony before the Coast Guard proceedings held shortly after the collision, which was repeated at trial:

"Q. I will refer you, sir, to page 4 of your testimony before the Coast Guard . . . wasn't your testimony as follows:

'I would say we were approximately two-thirds or maybe almost three-quarters of the way back to where our camp was located when

Mr. Blaney announced that his hat had blown over the side. At this time I pulled the power back and made 180° , turn and we went some distance, and there again, it would be hard to say how far or how long a time but what I judge to be more than the distance we had covered at the higher speed, since his hat blew off. Then he commented, well forget the hat and so I made 180° turn back again going in the initial direction but still going slow *and still looking for the hat*, in case we should run across it. *About this time I felt that I was probably concentrating mostly looking to the left side of the boat*, from which I was driving from and the glow of the lights from a boat anchorage in the Black Meadow area, and also being alert to the point of land that stuck out of the south side of the camping area, separating the boat and dock area from the camping area, being sure we didn't run aground on this point of land, which had a red flashing light on it. I feel that I was also aware of other boats in the area. I know that in the making of these turns that I was certainly looking around and that there were no boats to the best of my recollection. However, there was a boat southbound. After we had again started back to our camping area, it, uh, *again I didn't pay too much attention but he* was off to our right. He seemed to be going at a slow speed and I have no idea where he was or anything after that. However, I am aware that there were other boats on the lake. *I stress this to more or less justify or try to justify the fact that I saw nothing of the boat that we had the collision with.'*

Q. Was that your testimony at this time, sir?

A. Yes sir.

Q. And that is correct, to the best of your knowledge?

A. Yes sir." [R. 84-86] (Emphasis added).

Counsel went on to quote from Pearson's Coast Guard testimony in these terms:

" 'He [Blaney] was in the back, that is correct, and to the best of my knowledge he was sitting down. His hat had blown off as we were going at the higher speed and it is my understanding that when I knew I was on the left side of the boat he was looking out the right side of the boat, sitting down, as I explained to you, to your chief, out to the lake. I was sort of holding my head or sighting my—along to get the glare—because that was the only way,—light—there was no moon and the reflected light off the relatively light chop at the time was the only thing we could have seen to hope to find his hat.'

That again was your testimony, was it not? A. Yes sir." [R. 87].

In substance the explanation offered by Mr. Pearson to the Coast Guard for his failure to see Heiser's boat was that he was looking mostly to the left with his head down sighting along the surface of the water in hopes of seeing a hat silhouetted against the glare. Apart from the very dubious theory that Heiser's lights were blocked from view, this was the only explanation before the trial court, and doubtless it is the correct explanation.

III.

**The Standard of Care Employed by the Trial Court
Was Not Unreasonable.**

Section IV(b) of Pearson's brief is devoted, more or less, to the argument that the trial court invoked an unreasonable standard of care in holding him negligent.² His thesis seems to be:

(1) That the operative events leading to the collision developed very quickly; and

(2) That it is not reasonable to require a boat operator to keep so diligent a lookout as to be able to observe and react to the operations of other boats in so brief a time.³

With respect to the first proposition, we agree—although we submit that appellant overstates his case in suggesting that the court's finding in this connection is not accurate. As appellant indicates, Mr. Cherbak testified that it was not possible, under the circumstances, for him to give an accurate estimate as to how long the Heiser boat was outbound from Black Meadow Landing before the collision. Surely this must be so. Any estimate in seconds made by one of the participants is bound, in the nature of things, to be of dubious reliability. The computations on page 18 of Pearson's brief are no less dubious since they assume a constant speed of 20-30 miles per hour. The only evidence on

²It is worth noting that Pearson also charges the trial court with having failed to use the correct evidentiary standard; which is, we are told, that the evidence against Mr. Pearson should have been proved "beyond a reasonable doubt" (P. Br. 26). This extraordinary assertion requires no comment from us: it falls of its own weight.

³Pearson's third proposition, *vis.*, that even if he had seen Heiser's lights he could not have avoided the collision, is properly a proximate cause question and is discussed in that context, *infra*, at 14.

point is that Heiser's boat was stopped at Black Meadow Landing [R. 219]; that Heiser applied power gradually, without coming to full throttle [R. 222, 242]; and that his boat did not reach a speed of 20-23 miles per hour until just moments before the collision [R. 242, 258]. During this period the boat traversed a distance of 900 to 1,000 feet. Mr. DeFever, Pearson's expert, testified that, as one of his experiments, he accelerated his boat "rapidly", coming to *full* throttle "immediately" [R. 375]; and that in so doing he achieved the results set forth in Exhibit P. 43 (p. 28) which indicate that, even under conditions of maximum acceleration, his boat covered no more than approximately 575 feet in thirty seconds. Clearly, by accelerating at a normal rate to less than full speed, Heiser must have been considerably longer in traveling to point of impact. The court's finding that this period was approximately one minute is well supported by the evidence and can hardly be said to be clearly erroneous.

But the general point remains true. On narrowly confined waters, trafficked by highly-maneuverable speed boats, dangerous situations can develop with dramatic suddenness. A person operating a boat capable of speeds of more than 30 miles an hour on a lake occupied by other boats of like capability normally has less than a minute—seconds—within which to react. There is nothing unusual in this. It is a fact of life on our streets and highways—and in the air traffic patterns frequented by appellant as an airline pilot.

Appellant cites several cases for the proposition that the lookout requirement must not be applied rigidly (P. Br. 21-23). We certainly agree, although it is appropriate to note that each of these cases involved large ship collisions. Clearly, the standards appropriate to

collisions between large ocean vessels, where slow speed, momentum, lack of maneuverability, and long distance combine to impart a slow motion quality to the scene, do not apply here. As the court in *Stevens v. United States Co.*, a case noted on page 21 of appellant's brief, stated:

“[T]he quality and diligence of the lookout requirement depends upon the degree, and imminence of the danger reasonably to be anticipated.”

187 F. 2d 670 at 674 (1st Cir. 1951).

Two boats of the type which frequent Lake Havasu, and which are involved in this case, are capable of achieving a closing speed of roughly 60 miles per hour or more—or covering a distance of upwards of a mile in the space of a minute. Accidents, when they occur, will rarely, if ever, be in the making for more than a minute. If the standard of diligence required in operating such craft permitted one to relax his vigilance for periods of up to a minute, then the standard would be meaningless. We submit that vigilance which is not attuned to the needs of the situation is inadequate—in a word, is negligence.⁴

⁴The trial court found that while appellant was negligent he was not “grossly” negligent. From this it follows that he was not directly liable to the wrongful death claimants whose decedents were guests in his boat. While general maritime law does not provide a remedy for wrongful death, it does “adopt” state wrongful death acts where, as here, death occurs on inland waters. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S. Ct. 89 (1921). In so doing, however, admiralty courts are obliged to enforce the right as an integrated whole with all state created limitations, such as the Guest Statute, attached. *The M/V TUNGUS v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503 (1959). Appellee Stamper sued for personal injuries, not for wrongful death, and, accordingly, was not subject to the Guest Statute limitation. To suggest, as appellant does at page 13 of his brief, that the district court's judgment somehow did violence to California law is unjustified—it was not applying California law.

IV.

**Under the Rules of Navigation, Pearson's Was
the Burdened Vessel.**

The assertion (P. Br. 14) that the Heiser boat was the burdened vessel, and that Pearson could not be faulted under conventional crossing rules is demonstrably without merit. The trial court found, on ample evidence, that the Heiser boat approached Pearson's starboard bow [F. 16]. Both Pearson and Heiser testified that they were on steady courses prior to the collision. Under the circumstances, appellant was required under the Rules of the Road to yield to Heiser.

The rule is:

“When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.” (Steam vessels are any vessels propelled by machinery.)

33 U.S.C.A. 154-155.

It was Pearson's boat, therefore, that was the burdened vessel and not Mr. Heiser's. The fact that rules of navigation pre-suppose that vessels are visible to one another is true, but hardly germane, since the evidence established that Heiser's boat should have been visible to Mr. Pearson.

It is, perhaps, a little academic to stress crossing rules here: one does not yield the right of way to a boat one never sees. This does not, however, effect one's *duty* to do so. Obviously, no rule can rationally be followed if boat operators are not observant; if they fail to note the courses of other boats. Failure to keep sufficient lookout does not exonerate them from their fail-

ure to follow the rules. It simply means that they are doubly responsible; first, for failure to see the other boats, and then for their failure to carry out the rules. *Curtis Bay Towing Company v. Sadowski* (4th Cir. 1957), 247 F. 2d 422, 1957 A.M.C. 1847. It is obvious that, if a boat is obliged to give way to other boats coming from the right, it is of particular importance that the operator keep an adequate lookout to the right. A lookout which is directed predominantly to the left is of singularly little value in this connection.

V.

Pearson's Fault Was the Proximate Cause of the Collision.

It is quite well established that:

“[W]here a vessel has been guilty of departure from the rules or of other fault, she bears the burden of going forward with evidence to show that her fault did not cause or contribute to the collision. . . .”

Griffin, *On Collision*, § 24 at 40.

See, *e.g.*,

Esso Standard Oil Co .v. Oil Screw Maluco I,
332 F. 2d 211 (4th Cir.);

The Salutation, *supra*, at 4.

In our case each boat operator had the burden of showing that his faults were not causally related to the accident. Both failed.

Pearson argues that his fault could not have proximately caused the collision because Heiser's "glaring", "inexcusable" fault was alone sufficient to account for the accident (P. Br. 10-11). This surely is specious. the law *does* comprehend the concept of dual causation. The fault of two or more persons *can* contribute

proximately to an accident. When two vessels, both underway, collide without seeing one another no other conclusion is possible than that the fault of each contributed to the casualty.

We do not understand how the fact that appellant believes Mr. Heiser's fault was "glaring" or "gross" affects this situation. Implicit throughout appellant's brief is the assumption that one need only attach a pejorative label to another's conduct to be immune from criticism one's self. To this we can only say:

(1) The adjectives employed by Mr. Pearson are his alone. The court rejected his proposed finding of fact that Mr. Heiser's fault was "gross" [C. 77]. It went no further than to find that both boat operators were at fault, and that the fault of neither could be classified as minor [F. 22].

(2) The concept of comparative negligence is not relevant to any issue in this case, including the proximate cause issue. As Messrs. Gilmore and Black note in *Laws on Admiralty*:

"[A]merican law makes no provision for dividing fault—or damages—on a sliding scale of percentages. A vessel is either at fault or not at fault, and the effect of fault is never graded."

Id. at 402.

See, *e.g.*, cases cited, *infra*, at 24 *et. seq.*

Elsewhere in arguing this topic, appellant asserts that *if* he had seen the Heiser boat he *might* not have been able to avoid the collision. We are told that:

"With the white light invisible and the bow light alternating between red and green, there was no way in which the most experienced mariner could have determined the course of Heiser as he approached. . . ." (P. Br. 20).

This statement is completely at odds with the evidence and the court's finding. Even appellant's expert, DeFever, did not assert that the angle of Heiser's bow blocked off the stern light. The testimony was clear that Heiser followed a direct course to the point of collision. It follows, therefore, that both the red and green running lights of Heiser's boat should have been steadily visible to persons forward of Heiser's bow. If appellant had been looking, he would have seen both the red and green lights approaching from starboard which would, or should, have indicated to him that he was on a collision course with a boat that had the right of way; a boat that did not suddenly materialize seconds before collision—but one, rather, than had been on a steady course for more than enough time for appellant to have executed the appropriate maneuvers. Pearson's boat was highly maneuverable. It could, according to Mr. Pearson, achieve a top speed of more than 30 m.p.h. very quickly, and could turn in its own length or less [R. 111, 123]. The Pearson boat was $13\frac{1}{3}$ feet long; it was struck in an area 6 inches to $2\frac{1}{2}$ feet back from the bow [R. 33, Ex. P. 43 at 4]. Had it stopped, reversed, increased its speed forward, or turned in either direction at any time up to within a few seconds prior to the collision—the collision would not have occurred.

Appellant's concluding statement—that “no evidence was offered that any evasive action could have been effective” is not correct (P. Br. 20). The facts regarding Mr. Heiser's course, the period during which he

followed that course, the speed and operating characteristics of Pearson's boat, were all before the court. A more accurate statement would be that no evidence of any substance was offered by appellant to establish that evasive action could *not* have been taken; and it was upon appellant that the burden in this connection rested.

VI.

The Trial Court Did Not Err in Refusing to Apply the Major-Minor Fault Concept.

It is easier to state what the major-minor fault rule is not than what it is. Its essence is summed up as well as possible by Gilmore and Black in *Laws on Admiralty*, page 402 *et seq.*, as follows:

“Where the fault of both vessels causes the collision, the damages are divided—that is to say, such a decree is entered as shall have the effect that each bears half the total damages. In effect, this involves a payment by the less injured to the more injured vessel.

“It will be noted that the American law makes no provision for dividing fault—or damages—on a sliding scale of percentages. A vessel is either at fault or not at fault, and the effect of fault is never graded. Nevertheless, the operation of the so-called ‘major-minor fault’ rule sometimes mitigates the harshness of a doctrine which would divide damages equally in the case where one vessel is grossly negligent while the other is at fault, if at all, only in some technical sense. In such cases, the courts have sometimes announced their intention to resolve all doubts in favor of the comparatively innocent vessel, shutting their eyes to

what might under other circumstances have been regarded as fault, or have found that, in view of the grossness of the fault of one vessel, the minor error of the other cannot be said to be a contributory cause of the disaster.

“One way of stating the major-minor fault principle may be quoted from a leading Supreme Court case:

‘ . . . Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.’

“The major-minor fault ‘rule’ is vague and unreliable; in many cases a decree for evenly divided damages has been entered where the fault of one vessel was out of all proportion to that of the other. So in *Tide Water Associated Oil Co. v. The Syosset*, one of the vessels, the *Tycol*, was guilty of so many and such gross faults that the appellate court said:

‘We need not burden this opinion with a recital of the litany of the *Tycol*’s many acts and omissions from which the district court concluded that she was to blame, for she concedes her fault.’

“Among other things, she seems to have been showing her red and green side lights alternatively,

in a sort of winking pattern, the consequence, apparently, of her electing to pursue a zig-zag course. Confronted with this widely erratic navigation, the master of the other vessel failed to signal immediately (as required by one of the Rules of Navigation) that he did not 'understand the course or intention' of the *Tycol*. The court, holding the non-signaling *Syosset* for half-damages, said:

'Nor is the major-minor fault rule of any help to the *Syosset*. It is true that, were we free to apportion damages according to the degree of fault as is done by those countries which have adopted the Brussels Collision Convention of 1910, we would probably agree that a 50-50 division of damages here would be unjust. But even then we certainly could not say that the *Tycol* should bear 100% of the damages. The discussion above shows that the *Syosset*'s failure to sound the danger signal *immediately*, when in doubt as to the *Tycol*'s course or intention, had more than a minor part to play in causing the collision. Therefore, under the rule administered in American admiralty, she must bear half the damages.'

Feige v. Hurley, 89 F. 2d 575 (6th Cir. 1937) is probably the closest case to ours on its facts, although it does not talk about the rule. *Feige v. Hurley* is a case where Hurley was operating a Chris Craft motorboat with a 70 horsepower motor capable of going 35 miles an hour. While crossing the Ohio River, from the Indiana shore to the Kentucky side, at 22 or 23 miles an hour, he encountered a canoe 15 feet ahead. He put the wheel hard over, put his boat in reverse, struck

the canoe. The canoe was unlighted. The night was dark. It was held that Hurley was at fault for going at an excessive speed. It was held that the deceased, who was guiding the canoe, should have seen the other boat. The court held that both were at fault, and therefore denied a recovery for wrongful death to the deceased, saying (89 F. 2d at 577):

“The deceased, who was guiding the canoe, should reasonably have expected the presence of other craft upon the river and have foreseen the danger of a collision. He should therefore have exercised the utmost care. It was his duty both to look and listen and he was charged with the knowledge of what he might have discovered. The inference is that neither he nor any of the canoe party were either looking or listening. If they had looked they could have seen the lights of the approaching boat. If they had listened they could have heard the roar of its motor, which, under the evidence, was audible for at least 300 or 400 yards.”

The court says nothing about major or minor fault: had it deemed the rule applicable, there is no reason why it would not have permitted a recovery by the operator of the canoe.

Where boats come into collision, because an operator is doing something else, and hence fails to keep a look-out, the major-minor fault rule has nothing to do with the case—this itself is a “major” fault.

Curtis Bay Towing Company v. Sadowski, 247 F. 2d 422, 1957 A.M.C. 1847 (4th Cir. 1957);
Esso Standard Oil Company v. Oil Screw Maluco I, 332 F. 2d 211 (4th Cir.).

In *Curtis Bay Towing Company v. Sadowski*, *supra*, we have a comparable case. In that case two tugs were on crossing courses. One, the Gremlin, was the “burdened vessel”—*i.e.*, she had the Mareco on her starboard side (as Pearson had Heiser on the starboard side). Neither saw the other. The reason was that the Mareco—the “privileged vessel”—was watching another boat—as Pearson was watching the peninsula for the hat.

In that case the owner of the Mareco had a far stronger case than does Pearson. The Mareco, after all, in a crossing situation, was required to maintain course and speed. In our case, on the other hand, since Heiser was on the right, Pearson was “burdened”. As here, major-minor fault was urged. The District Court applied the major-minor fault rule on the ground that even if the Gremlin’s operator had seen the Mareco, he was entitled to assume the Gremlin would yield the right of way to Mareco (*Sadowski v. Tug Gremlin*, D. Md. 1957, 1957 A.M.C. 256, 147 F. Supp. 869.) The court of appeals reversed, saying:

“We are of the opinion that it must necessarily follow that a vessel, though she be privileged, must, through the maintenance of a proper lookout, preserve for herself the ultimate opportunity of escaping her predicament and avoiding the disaster by the exercise of experienced nautical judgment, when it has become apparent that the burdened vessel will be unable to avoid the collision.”

247 F. 2d at 425.

The same results follow *a fortiori*, when, as here, danger comes from the right side—from which other boats have the right of way—not the left. We submit

that this case—so much stronger than Pearson's for the boat which failed to look out—establishes, beyond doubt, that one cannot claim "major-minor fault", having blindly moved ahead.

Again, in *Esso Standard Oil Company v. Oil Screw Maluco I*, *supra*, we have a stronger case for major-minor fault than Pearson's. Yet the major-minor fault rule was not applied. In that case a tanker took the wrong side of the channel—went up the left side of the street, as it were. The tanker had no proper lookout. The tugboat also, however, did not look out. Nonetheless, the District Court held the tanker solely at fault under the major-minor fault rule. The Court of Appeals reversed, saying (332 F. 2d at 213):

"I. With the liability of the tanker admitted, the next inquiry is the behavior of the tug. She was at fault in many respects, but none so flagrant as the absence of a special lookout on the scow or at least in not otherwise providing sufficient observation when nearing the dam. Art. 29, Inland Rules of Navigation, 33 U.S.C. § 221, declares:

'Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequence of any neglect to carry lights or signals, or of any neglect to keep a *proper lookout*, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. * * *'

'[P]erformance of lookout duty,' Judge Soper declared for us in *Anthony v. International Paper Co.*, 289 F.2d 574, 580 (4 Cir. 1961), 'is an *inexorable* requirement of prudent navigation.'

“While this circuit has not gone quite as far in equating this neglect with a violation of the rules of the road, Judge Soper in the Anthony case further stated the consequence of the neglect in this way:

‘[W]e hold that the omission to perform this duty is *so grave a default as to give rise to a strong inference that it contributed to the accident and to impose upon the vessel the heavy burden to show by clear and convincing evidence that it did not so contribute.* Such a holding is surely justified in view of the more drastic rule laid down by experienced admiralty courts as a necessary safeguard for careful navigation.’ ” (Emphasis in the original).

And again, the court said at p. 215:

“The major-minor fault rule invoked by the District Judge in exculpating the tug we need not discuss. While the offenses of the tanker were grave, the failings of the tug were not minor, and certainly not so insignificant as to be eclipsed beyond consideration.”

Other cases, in some degree comparable to ours, where the “rule” was rejected are:

Tanker F. A. Verdon, Inc. v. Stakeboat No. 2,
340 F. 2d 465, 1965 A.M.C. 544, 548 (2d
Cir. 1965);

Gary v. The Echo, 334 F. 2d 199, 1964 A.M.C.
2326 (4th Cir. 1964);

Eastern S.S. Co. v. International Harvester Co.,
189 F. 2d 472, 476 (6th Cir. 1951);

Tide Water Associated Oil Co. v. The Syosset,
203 F. 2d 264, 268-69 (3d Cir. 1953).

We believe that the results described above are hardly escapable, for the rule has been restated time and again that if two boats are at fault, damages are divided 50-50, and degree of fault makes no difference.

The Atlas, 93 U.S. 302, 313-14 (1876);

Diesel Tanker F. A. Verdon, Inc. v. Stakeboat No. 2, 340 F. 2d 465 (2d Cir. 1965);

Esso Standard Oil Co. v. Oil Screw Tug Maluco I, 332 F. 2d 211 (4th Cir. 1964);

N. M. Paterson & Sons, Limited v. City of Chicago, 324 F. 2d 254 (7th Cir. 1963);

Tank Barge Hygrade v. The Gatco New Jersey, 250 F. 2d 485 (3d Cir. 1957).

What then does the major-minor rule do? Without exception, it would be found to apply only in cases where there is no fault, or where the fault was not a contributing cause of the collision. Little wonder that in *Boyer v. The Merry Queen*, 202 F. 2d 575 (3rd Cir. 1953), the court said:

"This rule is of little help in deciding cases. It has been observed that it is artificial and misleading unless very carefully applied [citing cases, including *The Admiral Schley*, 131 Fed. 433, aff'd 142 Fed. 64, cert. den., 201 U.S. 648] where it is pointed out that in many cases the rule would operate in reverse direction depending upon which vessel's faults were first considered in determining the cause of the collision." (Emphasis added.)

Id. at 579, footnote 11.

In *The Admiral Schley*, to which *Boyer v. The Merry Queen* refers, the court denied applicability of the rule, and pointed out the absurdity of permitting the rule

to produce different results depending on where one starts.

How is one to decide between first determining, for example, that Pearson was at fault for failure to keep a proper lookout, and then debate the significance of the major-minor fault rule in considering the effect of Heiser's speed, in preference to first considering Heiser's speed, and then debating the application of the major-minor fault rule to Pearson's poor lookout? The fact is that failure to keep a lookout—failure to see what was there, and the resultant failure to observe the rules for navigation with another boat on the right, was a serious fault which palpably contributed to the loss. Under those circumstances, the major-minor fault rule has nothing to do with the case.

Conclusion.

The evidence presented at trial was more than sufficient to support the trial court's finding that appellant Pearson was negligent and that his negligence was a proximate cause of the collision. We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WINCHESTER COOLEY III,

Nos. 22,399 and 22,399A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant

vs.

ROBERT W. HEISER and SANDRA STAMPER,

Appellees.

Appeal From the United States District Court,
Central District of California.

BRIEF FOR APPELLEE SANDRA STAMPER.

FILED

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APR 22 1968

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Nos. 22,399 and 22,399A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER and SANDRA STAMPER,

Appellees.

Appeal From the United States District Court,
Central District of California.

BRIEF FOR APPELLEE SANDRA STAMPER.

Preliminary Statement.

In a memorandum after trial by an advisory jury, the trial court, Honorable Francis C. Whelan, U. S. District Judge, found that claimant Sandra Stamper was, and is, entitled to damages for her personal injuries in the sum of \$140,000.00 from the petitioners, Pearson and Heiser. With respect to Pearson's appeal from the interlocutory judgment of liability in favor of Sandra Stamper and against William A. Pearson and Robert W. Heiser, appellee Sandra Stamper replies to the issues raised by appellant Pearson in his opening brief.

1. THE FINDINGS MADE BY THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD NOT BE DISTURBED.

The Supreme Court, in the leading case on the subject has established the doctrine or rule that no greater scope of review is to be exercised by the federal appellate courts in admiralty cases than they may exercise under Rule 52(a) of the Rules of Civil Procedure, and that, consequently, in reviewing a judgment of a trial court sitting without a jury in admiralty, the court of appeals may not set aside the judgment below unless it is clearly erroneous. *Guzman v. Pichirilo*, 369 U.S. 698, 8 L. Ed. 2d 205, 82 S. Ct. 1095; *McAllister v. United States*, 348 U.S. 19, 99 L. Ed. 748, 75 S. Ct. 6.

Under the *McAllister* doctrine which assimilates the scope of review in admiralty to that under Rule 52(a) [*McAllister v. United States*, 348 U.S. 19, 99 L. Ed. 748, 75 S. Ct. 6; *Marrero Morales v. Bull S.S. Co.*, 279 F. 2d 299] the traditional admiralty practice of a trial *de novo* on appeal generally has been held to be no longer applicable or substantially modified or restricted, at least to the extent that the factual determinations embodied in the findings of the trial court will be accepted by the appellate court as final and binding if supported by the record and not clearly erroneous.

In his opening brief appellant's argument includes:

A claim that an impractical and unreasonable standard of care and duty was imposed on Pearson.

A denial that failure by Pearson to see Heiser's lights should have been the basis, in whole or in part, for a finding that Pearson did not keep a proper lookout.

A claim based on conjecture coupled with a denial that even if Pearson had kept a proper lookout he might not or could not have been Heiser.

A claim based on conjecture coupled with a denial that even if Pearson had kept a proper lookout and could have seen or if, in fact, he had seen, Heiser, that Pearson could have taken any steps to avoid the collision.

A claim that the Major and Minor Fault Rule should have been applied as a matter of law.

A. Pearson Owed a Duty to Sandra Stamper to Exercise the Care of a Reasonably Prudent Mariner and to Maintain a Proper Lookout.

(i) Definition of Duty Owed.

Under maritime law, persons in charge of ships or vessels must at all times exercise “due diligence” and “maritime skill” to avoid injury to others, by collision or otherwise. The applicability of this rule to motorboats has been generally recognized. Thus it was expressly referred to in *The Adventuress* (1914), DC Mass., 214 Fed. 834, a case involving a collision between two motorboats, where the court said that it was the duty of a captain or master to exercise the care of a “reasonably prudent mariner”, to observe “reasonable care and prudence, not only against present dangers, but against impending perils,” and to take “seasonable measures of precaution.” In a few instances, the courts have expressed the duty to avoid collision in terms of the particular circumstances of the case.

Thus, with respect to the care required of a lookout, the court in *The Catalina* (1938), CA 9 Cal., 95 F. 2d 283, said that he must exercise the “highest watchful-

ness" and must be in a position "best adapted to decry vessels approaching at the earliest possible moment," applying such criterion to a motorboat which collided with a steamship during a fog. Similarly, in *Stevens v. United States Lines Co.* (1951), CA 1, 187 F. 2d 670, the court said that under the article of the Inland Rules providing that an owner should not be exonerated for "any neglect to keep a proper lookout," a lookout was required in every direction from which danger might reasonably be expected to arise, the quality and diligence of the lookout depending upon the degree and imminence of the danger, such rule being applied to the owner of a cabin cruiser in collision with an overtaking freighter in a busy harbor.

In *The O'Brien Bros.* (1919), CA 2 N.Y., 258 Fed. 614, the court, while holding a tug and a disabled motorboat equally liable for a collision, said that the motorboat owner acted as if the very smallness of his boat, or some privilege inherent in pleasure craft, entitled him to cast all the burdens of avoiding collision on the other vessel, whereas there was no legal distinction, under the rules of navigation, between vessels operated for pleasure and for profit, between large boats and small ones, or those with a numerous crew and those operated by one man. In *White's Estate v. Beauchamp* (1957), 348 Mich. 159; 82 N.W. 2d 472; 63 A.L.R. 2d 340, it was said that the owner of a motorboat had a duty, in its operation, to exercise reasonable care for the safety of his guests and to avoid exposing them unreasonably to danger by increasing the hazards of this method of travel, a failure to observe this duty constituting negligence.

The trial court found that "petitioner Pearson was negligent in failing to keep a proper lookout and such

negligence was the proximate cause of the collision" [Find. 20]. Appellant Pearson urges that failure to keep a proper lookout would be a contributing factor in the collision only if a reasonable standard of care would demand that a proper lookout aboard the Pearson boat could and should have seen Heiser's lights. However, the issue remains whether Pearson maintained a proper lookout in the first instance.

(ii) The Law With Respect to Lookout.

The court found that the collision occurred within the boundaries of the State of California on navigable waters of the United States, to wit, part of the Colorado River [Find. 13]. The Colorado River is navigable. *Arizona v. Colorado*, 298 U.S. 558; 80 L. Ed. 1331; 56 S. Ct. 848. The rules with respect to navigable waters do not affirmatively require a lookout. It is merely stated that nothing in the rules exonerates a party from the consequences of any neglect to keep a proper lookout 33 U.S.C. Sections 147(a) and 221. (Section 221 is known as Article 29 of the Inland and Pilot Rules).

There is no doubt that a party who fails to keep a proper lookout is at fault. *British Columbia Mills Tug & Barge Co. v. Mylroie*, 259 U.S. 1. Even a privileged vessel has no right to take her course with her eyes shut. *The Devonian*, 110 Fed. 588. The ship will be at fault if the lookout fails to see or hear what, if he had given heed, he should have seen or heard. The lookout must be properly stationed and have no other duty. (Law for Yachtsmen, Greeley, p. 25.) If the provision of Article 29 in regard to keeping a proper lookout is negative in form, nothing could be more positive than the obligation as construed by the civil courts and, it might be added, by naval courts and boards.

A lookout has been defined by the federal court as a person who is specially charged with the duty of observing the lights, sounds, echoes, or any obstruction to navigation with that thoroughness which the circumstances permit. *The Tillicum* (1941), Wash., 217 Fed. 976. The words specially charged imply that such person shall have no other duties which detract in any way from the keeping of a proper lookout. Thus it has been held in numerous cases that because the lookout must devote his attention to this duty, the officer of the deck or the helmsman cannot properly serve as lookout. *The Kaga Maru* (Wash. 1927), 18 F. 2d 295; *The Donau* (Wash. 1931), 49 F. 2d 799. Even on a slow moving tug with a tow, the duty is not legally complied with by the officer in charge of navigation keeping a lookout from the pilot house. *The City of Philadelphia* (Pa. 1894), 62 Fed. 617; *The Sea Breeze*, Fed. Cas. #12,572a. Where the captain of a steamer is acting at the same time as pilot and lookout, the vessel has not a proper lookout, and the owners may be liable for the damage caused by such omission. *Bill v. Smith* (1872), 39 Conn. 206; *Dahlmer v. Bay State Dredging & Contracting Co.*, (CCA Mass. 1928), 26 F. 2d 603. A seaman who has been dividing his attention between looking out and reefing sail was held not to be a vigilant lookout. *The Twenty-one Friends* (Pa. 1887), 33 Fed. 190. Where the only two men on the deck of a schooner navigating at night were engaged in taking down sail, it was held that neither one nor both seamen constituted a proper lookout and accordingly the schooner was at fault for colliding with another schooner having the right of way. *The Fannie Hayden* (Me. 1905), 137 Fed. 280.

Many court decisions on the subject indicate that the strict performance referred to means, at least in most circumstances, not only that lookouts shall be free from other duties but that they shall be (1) qualified by a certain amount of experience as seamen, (2) vigilant and alert, (3) properly stationed, and (4) in such numbers as circumstances require in order that the vessel may avoid risk of collision. See *The Rules of the Nautical Road*, Farwell, pages 357 to 379. In *Simplified Rules of the Nautical Road*, U. S. Naval Institute, Wills, rules for the prevention of collision are summarized as follows at pages 1 and 2:

Collisions will be prevented if the following principles are applied: a. The rules of the nautical road, in the light of court interpretations, are always, and fully, complied with. b. A proper lookout is maintained—a lookout is the eyes and ears of the ship—even in the presence of radar. His job is to discover as early as possible the approach of ships and to report that information to the Officer of the Deck. The courts have required that lookouts be: Experienced seamen; assigned no other duties while acting as lookouts; alert and vigilant. Always stationed to best observe, see, and hear the approach of other vessels; stationed in sufficient number to detect a vessel approaching from any direction; bearings of approaching vessels are observed.

The failure of a steamer to see a sailing vessel which she ought to have discovered, in time to give her sufficient room, is a fault rendering the steamer liable if it results from insufficient lookout. *The Belgenland* (1885), 29 L. Ed. 152. The excuse that a vessel is unable to determine, by reason of the darkness and the direction of the wind, from the lights of the

other vessel, on what course she is sailing, and which is the privileged vessel, cannot be invoked where, by reason of the inefficiency of her lookout, she failed to discover the approaching vessel until the two were in close proximity, and she had no time to study the situation. *The Queen Elizabeth*, 100 Fed. 874 (reversed on other grounds) 122 Fed. 406. A burdened vessel which fails, through the inexcusable absence of her lookout, to maintain it steadily, and thus causes a collision, is liable. *The Robert Graham Dun* (CCA 1895), 70 Fed. 270.

In the *Ariadne* (1872), 13 Wall. 475, the United States Supreme Court delivered the following requirements for a proper lookout in a case that arose out of a collision between a steamship and a brig outside New York Harbor on a foggy night:

The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. . . . It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony to the contrary.

(iii) **Pearson Breached His Duty to Keep a Proper and Adequate Lookout and Violated the Standard of Care for Such Lookout.**

We need only apply the standards prescribed by the courts for keeping a proper and adequate lookout to the facts adduced at the trial to determine whether the finding of the trial court that Pearson did not keep an adequate lookout is supported by substantial evidence.

Who was specially charged with the duty of observing the lights, sounds, echoes, and obstructions to navigation with that thoroughness which the circumstances demanded? Pearson, the owner and master of his vessel, a experienced boater with a background of knowledge of the rules of navigation and a licensed seaman.

Appellee has abstracted the relevant facts pertaining to the collision in Appendix A attached hereto and made a part hereof. From the summary of Pearson's testimony it is submitted that Pearson was engaged during a period of two to five minutes before the collision in operating his vessel with the throttle almost idle; his head cocked at an unusual angle, his eyes sighting along the water searching in the glare cast by the illumination from the shore for a lost hat, and his mind preoccupied with the outline of the adjoining peninsula and the red light on his port side.

It is respectfully submitted that Pearson did not maintain a high degree of vigilance in the exercise of his duty as a lookout. Pearson did not use his eyes to see and his ears to hear; he was not properly stationed as a lookout; he had assigned himself to another duty which interfered with his function as a lookout, *i.e.*,

to circumnavigate idly about the waters of the Lake seeking to find a lost hat.

The fact that a vessel had no sufficient lookout is *prima facie* evidence that the collision was caused by fault on her part. *Beavers v. The North American* (DC NY), Fed. Cas. 1, 201. Pearson calls upon this court to overrule the finding of the trial court that Pearson had not kept an adequate lookout based upon a claim or conjecture that even if Pearson had in fact kept a proper lookout he either could not or would not have seen Heiser. Thus much of the testimony adduced by Pearson by experts called by him is devoted to establishing that one in Pearson's position could not, or should not have seen the lights on the Heiser boat.

Testimony in the nature of experiment must be regarded with great caution since of necessity the angles of approach of Heiser and Pearson immediately prior to the collision, the lines of sighting, the speeds of the two vessels, the angles of inclination at all times during the final approach preceding the collision and all of the variables which were necessarily unknown to the experts were not incorporated within the body of such experiments. Most critical of all, such expert testimony failed to concern itself with the lookout issue as to whether one in Pearson's position could have or should have in fact heard the 180 horse power gasoline engine on Heiser's 16 foot Chris Craft boat [Find. 4 admitted by the pretrial conference order]. At the time of the collision Pearson was barely moving or drifting. No testimony was adduced by Pearson to the effect

that his hearing was defective or there was any impediment which prevented his sensory organs, the ears, from receiving the vibrating and roaring noise which poured forth from the Heiser boat during the entire course of its run.

It is the duty of the lookout not only to see what there is to see but to hear what there is to hear, including the approach of other vessels. Pearson gives no explanation whatsoever of his failure as a lookout to hear Heiser's approaching boat. A vessel having no lookout has the burden of showing that the absence of a lookout did not contribute to the collision. *The San Simeon*, 1 F. Supp. 506 (1932), AMC 911 (affirmed) 63 F. 2d 798; 1933 AMC 489.

Two other points deserve mention. One, that Pearson had been up and awake since approximately 5:00 o'clock the morning of the day of the accident [Rep. Tr. p. 170, lines 11-18]. Second, that Heiser as he returned to the Pearson boat lost sight of Pearson's lights [Rep. Tr. p. 227, lines 6-16]; that Schonning, an occupant of the Heiser boat did not see the green light on Pearson's boat at any time following completion of Heiser's turn back toward the Pearson vessel [Rep. Tr. p. 278, lines 16-21] until just before the collision; that Cherback, an occupant in Heiser's boat, saw Pearson's red and green lights as the Heiser boat turned back toward the Pearson boat then saw the Pearson green light only from which Cherback concluded that the Pearson boat was turning [Rep. Tr. p. 305, line 19, to p. 307, line 1].

An inference may be drawn that Pearson's faculties were dulled; he had been up for 15, 16, or more hours; he was not fresh and rested, but was fatigued, and therefore could not in fact use the judgment necessary to maintain a proper and adequate lookout. Further inference may be drawn that while the Heiser boat was proceeding toward Pearson's boat that even at such time and after Pearson had completed his second 180° turn that Pearson was still cruising in a pattern of search for a lost hat; such a circinating pattern that observers could not follow the direction of navigation by Pearson's navigational lights lending additional support to the thought that Pearson was indeed searching and cruising and looking for a lost hat and was not maintaining a proper lookout.

The finding of the trial court that Pearson did not keep an adequate lookout is supported by substantial evidence. There is no particular reason to follow the wild hare that Pearson has started that had he in fact been keeping a proper lookout he could not or would not have seen Heiser's lights. The hazard of such speculative endeavors should not outweigh the trial court's finding with respect to Pearson's failure to keep an adequate lookout. It is respectfully submitted that no contrary testimony has been introduced by Pearson which vindicates his failure to maintain a proper and adequate lookout; by reason whereof every doubt as to the performance of Pearson's duty and the effect of non-performance should be resolved in favor of appellee.

B. There Is No Competent Evidence to Support Pearson's Claim Based on Conjecture Coupled With Pearson's Denial That Even if He Had Kept a Proper Lookout and Could Have Seen or if in Fact He Had Seen Heiser That Pearson Could Have Taken Any Steps to Avoid the Collision.

In *The San Simcon*, *supra*, Circuit Judge Learned Hand held that the law throws upon a vessel which fails in her duty the chance of speculations as to what the other vessel would have done if she had fulfilled her duty. The court said at page 801 :

. . . The Commercial Mariner had probably been inattentive and had not heard the double blast; or had disregard it. She had only one officer on the bridge and no lookout forward. While we agree that a lookout will not keep reporting a vessel once seen, we are not advised that he would not report a subsequent signal. We hold the Commercial Mariner for failing to answer the double blast with an alarm. As to this fault, it is indeed true that the Commercial Mariner was not in doubt as to the San Simeon's intention, and, reading the rule literally, that is the only occasion for the danger signal. But a fortiori when the proposed navigation is plainly impracticable, the ship should blow. *The Bergen* (D. C.) 108 F. 555, affirmed 128 F. 920 (C.C.A. 2). It is indeed impossible to say that this would have changed the result, but the fault being a breach of the rule, the Commercial Mariner must satisfy any doubts. Such a sig-

nal would have told the *San Simeon* that the Commercial Mariner thought her navigation dangerous; not being followed by a backing signal it ought to have told her that she was coming on. It is impossible to say what she would have done in this predicament, but it must have appeared to her that the Commercial Mariner did not mean to pass under her stern. It is quite possible that she would have slackened speed, as she did when the situation developed more completely. A very little change would have sufficed; the Commercial Mariner needed only about seven seconds to escape. Such speculations the law throws upon the vessel which fails in her duty. It seems to us enough to charge her. . . .

The Pearson vessel was 13 feet overall. [Find. 3 admitted at pretrial conference order]. It had an out-board motor and at idle it could pivot on the bow and even make a turn less than the length of the boat; it had just a small turning radius [Rep. Tr. p. 138, lines 5-13]. With such maneuverability and such faculty for avoidance of a collision quickness in response was at a premium and moments of delay were fatal. As in the *San Simeon*, *supra*, the collision was due not to any error of judgment on the part of Pearson *in extremis* since Pearson exercised no judgment whatsoever and took no action to avoid the collision but, it is respectfully submitted, was due to Pearson's failure to maintain a proper and adequate lookout.

C. As to Appellee Sandra Stamper the Major and Minor Fault Rule Properly Was Not Applied.

Counsel for appellant conceded the inapplicability of the Fault Rule during the trial:

Mr. Sampson: . . . assuming you should find fault on the basis of both would we have a right to proceed against the one that is guilty of the lesser fault and collect from him and his only right would be for indemnity against the other wrongdoer.

Mr. McHose: (counsel for appellant Pearson) I think that is true, as a matter of law, yes." [Rep. Tr. p. 105, line 23, to p. 106, line 7].

A third person such as Sandra Stamper who is injured in a collision occasioned by the fault of two or more vessels can proceed against the vessels jointly or against either separately and such innocent third party is insulated from the application of the Fault Rule which applies *inter se* between two vessels but not to the injured third party. In a proceeding against either vessel separately the libelant's recovery is not limited to one-half the damages but extends to the entire amount.

48 Am Jur, Shipping, Section 243;

The O'Brien Bros. (1919 CA 2 N.Y.), 258 Fed. 614; 63 A.L.R. 20, 343, 349;

The Hamilton, 146 Fed. 724, 77 C.C.A. 150. Affirmed, 207 U.S. 398, 28 S. Ct. 133, 53 L. Ed. 264;

The Michael Tracy, 43 F. 2d 965;

The Washington (The George Washington v. Cavan), 9 Wall. (U.S.) 513, 19 L. Ed. 787.

Thus, in the *Michael Tracy*, *supra*, L. Hand, Augustus Hand, and Chase, Circuit judges, held the Fault Rule inapplicable to innocent third parties. Judge Augustus Hand stated at page 967:

The rights or liabilities of the Cape Cod do not determine the liability of the Michael Tracy. The former may have been at fault for having defective gear which had not been properly maintained or inspected, or she may have been without fault because a log disabled her rudder. In the first case the Cape Code could only recover half damages but in the second case the Michael Tracy would be solely liable. Likewise under the familiar doctrine in admiralty, if the fault of the Cape Code because she failed to act when she had plenty of time as well as space within which to navigate was very gross, the Michael Tracy although herself a wrongdoer, would not be liable to the Cape Cod when the opportunity of the latter to escape was so great. But in none of these cases would the Michael Tracy be free from wrongdoing or from liability as a tort-feasor to the innocent owner of the cargo whose right the libelants here represent. *The Beaconsfield*, 158 U S 303, 15 S. Ct. 860, 39 L. Ed. 993. Any excuse which she might have does not apply to them.

It is respectfully urged that no warrant exists in law for applying the Major & Minor Fault Rule to Sandra Stamper, an innocent third party, involved in the collision.

Conclusion.

Appellant has failed to comprehend the meaning and significance of a lookout. Far from being at minor fault, it is submitted that appellant was not less culpable than Heiser in tragic circumstances wherein three people lost their lives and one, Sandra Stamper, was seriously and permanently injured.

It is respectfully submitted that the findings of the trial court were supported by substantial evidence and that the interlocutory judgment with respect to liability should be affirmed.

Respectfully submitted,

CAIDIN, BLOOMGARDEN & KALMAN,

By NEWTON KALMAN,

Attorneys for Appellee Sandra Stamper.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

NEWTON KALMAN

APPENDIX A.

Summary of Pearson's Testimony.

1. As Pearson proceeded back across the Lake he could see the Black Meadow Landing; it was a mass of lights, a well lit area; he could see house trailer lights, street lights, store lights, car lights and "just lights in general." It was very easy to see from that relatively short distance [Rep. Tr. p. 40, line 19, to p. 41, line 7].

2. There was a red light on the Black Meadow peninsula which was visible from all the way across the Lake [Rep. Tr. p. 41, lines 10-24].

3. Pearson was $\frac{2}{3}$ rds to $\frac{3}{4}$ ths across the Lake when Blaney called that he had lost his hat, whereupon Pearson pulled the throttle back and made a 180° turn [Rep. Tr. p. 48, lines 5-23].

4. As Pearson retraced his course he did so for a minute or two in time, with the throttle idle, moving probably 2-3 miles per hour [Rep. Tr. p. 49, lines 12-25].

5. After Pearson reduced his speed to 2-3 miles per hour he never again increased his speed at any time before the collision occurred [Rep. Tr. p. 50, line 22, to p. 51, line 2].

6. After Pearson returned to his course headed back to Black Meadow Landing he traveled about 1-2 minutes according to his best estimate up until the time of the collision, or at least a good many seconds, perhaps a minute [Rep. Tr. p. 51, lines 3-18].

7. Pearson was looking ahead and to the left and does not recall looking off to the right but was scanning from ahead of the boat back to the left and probably behind on the left, trying to get a sight of the

red light he knew was there [Rep. Tr. p. 52, lines 17-22; Rep. Tr. p. 59, line 23, to p. 60, line 8].

8. Pearson never saw any boat approaching his boat from the shore [Rep. Tr. p. 53, lines 1-3].

9. When Pearson started back to the Black Meadow Landing he was aware of a glare on the water from the camp area; he was looking down and was somewhat concerned about trying to find the hat [Rep. Tr. p. 54, lines 8-23].

10. Pearson was looking for the hat and was concerned with the point of land on his left and couldn't see where he was going, that was obvious, because of all the lights [Rep. Tr. p. 55, lines 8-13].

11. Pearson had not stopped looking for the hat at the time of the collision [Rep. Tr. p. 55, lines 15-17].

12. Pearson didn't know and couldn't tell the angle of the collision at the moment of collision. He never saw the Heiser boat until afterwards. He didn't remember seeing the boat or even hearing the noise of the impact of the crash which must have been considerable [Rep. Tr. p. 58, lines 11-25].

13. He could see the lights where he was headed, they were obvious but he couldn't see the light that he identified as the approaching boat [Rep. Tr. p. 60, lines 9-14].

14. In the area where the collision occurred there was a glare on the water and the lights in the general area where Pearson was headed was significant. The glare on the surface of the water was sufficient to assist in looking for any object floating on the water [Rep. Tr. p. 61, lines 6-20].

15. There were three boats in the area of the collision including Pearson's boat, Heiser's boat and another boat in a space of a few minutes [Rep. Tr. p. 83, lines 7-14].

16. Pearson's attention as he came back toward Black Meadow Landing was concentrated more on the left side of the boat because he was concerned about the piece of land that stuck out there [Rep. Tr. p. 84, lines 5-11; p. 85, lines 2-21].

17. He had no idea why he couldn't see Heiser [Rep. Tr. p. 84, lines 12-17].

18. As he made a second 180° turn to resume his course to the Black Meadow Landing he was still going slowly and still looking for the hat "in case we should run across it." As he was headed back toward Black Meadow Landing he was aware of other boats in the area [Rep. Tr. p. 86, lines 2-17].

19. In order to look for the hat he was holding his head down close to the water and sighting along looking for the glare [Rep. Tr. p. 86, line 23, to p. 87, line 23].

20. On the way back to the Black Meadow Landing at some point the Heiser boat passed the Pearson boat on the way back to the Landing. The distance separating the boats was approximately 50 feet [Rep. Tr. p. 127, lines 1-2].

21. Pearson did not instruct anybody in his boat to look for the hat or to look for other boats [Rep. Tr. p. 139, lines 8-13].

22. He continued to look for the hat. He was holding his head down and looking and there was a glow

from his bow lights. He was looking down and also looking along the water as well as looking down [Rep. Tr. p. 142, lines 6-24].

23. After the second 180° turn as he headed back toward Black Meadow Landing he proceeded on the course two minutes or more; considerably longer, the way “we were outbound” and never advanced the throttle [Rep. Tr. p. 144, lines 14-21].

24. It was a clear night, no fog or mist [Rep. Tr. p. 145, lines 12-17].

25. After making the 180° turn the second time he actually continued for more than twice two minutes. Actually he had no idea if it was 2 to 5 minutes because he was going so slowly [Rep. Tr. p. 146, lines 7-13].

26. He was concentrating more on the navigation of the boat and looking for other boats than he was looking for the hat because of his concern about going around [Rep. Tr. p. 146, lines 14-19].

27. He does not recall the impact noise. He had heard no noise from any engine [Rep. Tr. p. 147, lines 1-3].

28. He actually was familiar with the area and the flashing lights and the silhouette of the peninsula [Rep. Tr. p. 147, lines 16-22].

29. When he headed back toward Black Meadow Landing there was light on the water coming from lights on the shore and he used such lights in attempting to locate the hat [Rep. Tr. p. 159, lines 13-21].

30. When he made the second 180° turn and started back toward Black Meadow Landing he continued to devote a small amount of attention to looking for the hat and was primarily concerned about getting back to the landing [Rep. Tr. p. 164, line 23, to p. 165, line 4].

31. He had been up since 5:00 of the morning of the date of the accident [Rep. Tr. p. 170, lines 6-13].

IN THE
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WILLIAM A. PEARSON,

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Appellees.

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No. 22399 and 22399A

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER and
SANDRA STAMPER,

Appellees.

CLOSING BRIEF FOR APPELLANT

INTRODUCTION

This closing brief will respond only to the principal points raised by the Heiser and Stamper briefs.

Pearson recognizes that the rule of *McAllister v. United States* (1954) 348 U.S. 19 governs in this Circuit and that appeals in admiralty are restricted by the "clearly erroneous" doctrine. We have not based this appeal on any contrary rule, but have accepted the facts found by the District Court for the purposes of this appeal. Nevertheless, we submit that this Court is not constrained by *McAllister* to affirm the decision below. For the reasons stated herein we believe this Court should rule that the District Court erred in concluding,

under the facts found, that Pearson was negligent or that his negligence was the proximate cause of the collision, or that his fault — if any fault there be — was not a minor fault within the meaning of the major-minor fault rule in admiralty cases.

I

This case is not controlled by the “clearly erroneous rule”. It arises out of the Trial Court’s imposition of an erroneous standard of care.

We do not mean to be understood as conceding fault on this appeal by making reference to the major-minor fault rule. As Griffin has noted [*Griffin on Collisions* 505-9] the major-minor fault rule is in fact a polyglot of rules, not all of which accept fault of both parties as a precondition for their application. In part the rule is a rule of evidence, the thrust of which is “fault not proved”. Hence Stamper’s authorities as to the position of an innocent third party [Stamper Br. 15] are not in point: On the authorities cited below and in our opening brief, Pearson contends that neither his fault nor the casual relation of his conduct to the collision was shown. This Court should have clear what the findings and conclusions, and the evidence before the trial court, do *not* show:

(i) Neither the findings nor the evidence sustains Heiser’s statement that a steady red and green light would have been visible had Pearson been looking for it. This is sheer supposition. The only pertinent testimony was that of the experts called by the two boat operators. De Fever stated that no lights were visible. Captain Wetmore and the photographer Thompson, testifying for Heiser, stated that the running lights alternated between red and green and the white light was intermittently obscured *at the critical speeds*

[R. 622, 626, 639-40, Ex. H-19]. Thus the only possible conclusion on the evidence before the Court, as viewed in a light most favorable to appellees, was that Pearson's target was presenting alternate red and green running lights and no white stern light at all.

(ii) Stamper's argument to the contrary notwithstanding, there is no evidence at all in the record, nor indeed any finding, regarding the audible noise level on the night of the collision. The burden of showing that Pearson should have *heard* as opposed to *seen* the approaching Heiser boat clearly rested with the claimants against his petition. *Walston v. Lambertson* (9th Cir. 1965) 349 F.2d 660. Nothing having been presented on this argument, the argument must necessarily fall and with it, incidentally, falls the case upon which Heiser primarily relies [Heiser Br. 19] to refute the application of major-minor fault rule. *Feige v. Hurley* (6th Cir. 1937) 89 F.2d 575 was a "failure to hear" case, as the appellate court clearly noted at page 577.

(iii) There is no substantial evidence regarding the visibility of Heiser's boat in silhouette against the background lights of Black Meadow Landing. The inference proposed by Heiser, which does not appear as a finding, is contrary to the testimony of the witnesses actually on the water and those standing on shore. See for example the testimony of Bird [R. 690-691] and Parmelee [R. 719, 724]. Chief Bandel was not on the water that night and his testimony was hypothetically stated. [R. 401].

The trial court must, therefore, necessarily have concluded that Pearson's fault lay in his failure to see the approaching Heiser craft *without more*. This, it is submitted, is not the law. Even the authorities cited by both appellees show that a variable standard is applicable to

the duties and obligations of a lookout. In addition, numerous courts have held that the absence of a lookout does not violate the standard required by the lookout rule. *E.g. Lind v. United States* (2nd Cir. 1946) 156 F.2d 231; *Atkins v. Lorentzen* (5th Cir. 1964) 328 F.2d 66; *Koch Ellis Marine Contractors, Inc. v. Chemical Barge Lines, Inc.* (5th Cir. 1955) 224 F.2d 115.

In effect, the trial court failed to give any weight to the need for evaluation which the situation confronting Heiser presented. As the *Lind* case points out, it is not enough that a lookout perceive an approaching object; a lookout must also evaluate the object accurately so as to take evasive action. On the evidence before the trial court, there is nothing to show that Pearson *could have evaluated* either Heiser's course or speed. In disregarding this aspect of the lookout problem, the trial court imposed an absolute standard. Such a standard is not a question of fact but is always a matter for the court and as such should be corrected by this Court. *Restatement, Torts 2nd*, Section 328B; Cf. *Amaya v. Home Ice Co., Inc.* (1963) 59 Cal.2d 295.

II

Even viewed as a matter of fact, the trial court's finding of negligence and causation was clearly erroneous.

As we have indicated, we view the nature of this appeal as being one arising out of an improper standard of care imposed upon a small boat operator. However, even assuming that only fact issues are presented for review, we nevertheless believe that the finding as to negligence and causation [R. 77] is clearly erroneous. Both appellees stress that Pearson was still "looking for a hat" at the time of the collision. Accepting this and the District Court's finding of that effect, wherein is the negligence?

Was it negligent for Pearson to concern himself with a prominence on which he feared grounding? Was it negligent for him not to anticipate that the *only other boat on the water* — a boat which he knew was safely past him and headed for shore — would suddenly reverse course and charge blindly and precipitately at him? We submit not.

The Heiser brief stresses “danger” on confined waters trafficked by speed boats as though peaceful Lake Havasu was a busy harbor with craft roaring all about at high speeds. Actually at 10:00 o’clock on a Friday night there was very little activity. The only testimony on this was in cross-examination of Pearson. He saw lights of one boat which passed astern of him coming down river (R. 131). Pearson had completed the turn a considerable time before the collision (R. 144). He continued at slow speed of not more than 2 or 3 mph (R. 138, R. 144). He was asked:

“Q Right, and you knew and had reason to know that the area around this point was heavily traveled with weekend vacationers, many of whom had experience and many of whom did not have experience in the operation of small boats, did you not?”

THE COURT: At what time, counsel?

BY MR. CAIDEN:

Q At the time you were out there that evening?

A No, sir, there was not a lot of traffic at that time of the — on a Friday night, in the water, if you are talking.”

The Heiser brief also discusses the risk when speed boats capable of 30 mph approach each other. We would readily grant that if Pearson had been speeding at 30 mph, or even much less, and thereby risking running down another boat, a vastly different standard of care

would have been required. Here, however, Pearson was proceeding slowly, at 2 to 3 mph (R. 49, 50, 82, 144). He had no reason to expect another boat, particularly Heiser's, might head for him without even a lookout and run him down.

The speed of the Heiser boat is de-emphasized in the Heiser brief by referring to the testimony of Heiser that he accelerated *gradually* (R. 222), and *ultimately* reached a speed of about 20-23 mph (F. 11). However Heiser testified he *did* speed up after he completed his turn (R. 223) and Schoning confirmed that Heiser accelerated as he came out of the turn (R. 270). Bird, who watched the Heiser boat from the shore also confirmed that Heiser accelerated away from the landing at a speed up to 20 or 25 mph (R. 690, 691).

The Heiser brief quotes at length from Pearson's description of the collision made during Coast Guard proceedings a few days after the accident. Portions are italicized. It is apparently suggested that it was somehow wrong for Pearson to be concerned about the point of land to his left which he was watching for to be sure to avoid running aground. The District Court found Pearson's attention was "predominantly to his left," apparently concluding this was negligent. We submit such a conclusion is wholly unjustified.

In the same quote on Page 8 of the Heiser brief counsel italicize Pearson's words, "I didn't pay much attention." Taken in context, it is clear Pearson referred only to the boat which had passed astern of Pearson, — not to what Pearson was doing just before collision. (R. 142, 143).

On Page 9 counsel also emphasize the argument that Pearson was also "still looking for the hat" at the time of collision — urging of course that this also was negligent.

Indeed, appellees present to this Court a case which was not before the court below. To say that a boat operator traveling at high speeds in a heavily trafficked area should be alert has little to do with the facts of this case. Of even more importance, the trial court should have recognized that Pearson's failure to see Heiser was in no way an effective cause of the accident. At most, it was merely a condition upon which the apparent and conceded negligence of Heiser operated. *P. Dougherty Co. v. United States* (3rd Cir. 1953) 207 F.2d 626, 631, cert. den. (1954) 347 U.S. 912, and authorities cited. As indicated by the cases set out in our opening brief, the negligence of Heiser, in itself, was sufficient to account for the collision. *Compania de Maderas de Caibarien S.A. v. The QUEENSTON HEIGHTS* (5th Cir. 1955) 220 F.2d 120, cert. den. 350 U.S. 824. In the circumstances, Pearson was entitled to have his fault and its effect upon the collision established beyond a reasonable doubt. *Compania Nacional de Navegacao Casteiro Patrimonio v. Cabins Tanker Industries, Inc.* (4th Cir. 1961) 285 F.2d 592, 594, cert. den. 366 U.S. 948. This, it is submitted, was not done, and for this reason the trial court's decree should be reversed.

III

Assuming Pearson's fault, the major-minor fault rule should nevertheless have been applied.

Heiser proposes, without citation to authority, that the trial court was governed by rules for a crossing situation in which the Pearson boat was the burdened vessel. This is clearly not the case. The navigating rules presuppose that approaching vessels are in sight of one another and can check each other's position. *Lind v. United States, supra*; *Borcich v. Ancich* (9th Cir. 1951)

191 F.2d 392 (and cases cited at note 4). While Heiser was proceeding away from Pearson no relation between them existed. There was no need for precaution on Pearson's part. Only when Heiser turned did a "risk of collision" arise. *At that point* Heiser knew where Pearson was and knew he was headed toward Pearson. Pearson then had no reason to suspect Heiser's approach. Even assuming he thereafter failed to see him, such failure occurred in extremis and was subject to the application of the rule governing special circumstances. Obviously the Court so felt. Had it not, then why would it have ruled against Heiser (presumably the privileged vessel) without taking the case under submission while submitting the question of liability of the *burdened* vessel. On the facts found, the Court cannot have applied the crossing rules. We submit it would have been clearly erroneous for it to do so.

The cases upon which Heiser relies to establish the nonapplicability of the major-minor fault rule do not do so for this situation. The case which Heiser says is most favorable to his position [*Feige v. Hurley, supra*] has already been distinguished. The *Tug MALUCO I* case [*Esso Standard Oil Company v. Oil Screw Tug MALUCO I* (4th Cir. 1964) 332 F.2d 211] is one in which the court was dealing only with the question of positioning a special lookout, in circumstances where the helmsman was blinded by an approaching searchlight aboard the tanker with which she ultimately collided. *Curtis Bay Towing Company v. Sadowski* (4th Cir. 1957) 247 F.2d 422 lacks two critical elements which are present here; namely, the short interval of time within which to sight the approaching Heiser craft and, second, the impossible problem of evaluation which confronted Pearson. It is submitted that this case is properly resolved upon the principles of yet another decision of the Fourth Circuit:

“The case is a typical one for the application of the established rule that when the fault on the part of one vessel in a collision, sufficient to account for the disaster, is established by uncontroverted proof it is not enough to raise doubts about the management of the other vessel, but in order to hold her liable there must be proof of fault beyond a reasonable doubt.” *Compania Nacional De Navegacao Casteiro Patrimonio v. Cabins Tanker Industries, Inc., supra*, at 594.

CONCLUSION

For the foregoing reasons and for the reasons set out in our opening brief we submit the trial court erred both in the legal standard which it applied to Pearson's conduct and in the factual standard from which it drew its findings of negligence and proximate cause.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

No. 22,400 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES H. LUNDQUIST,

Appellant,

vs.

JOE TURNER,

Appellee.

Appeal From the United States District Court
Central District of California.

APPELLANT'S OPENING BRIEF.

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FILED

JAN 10 1968

WM. B. LUCK CLERK

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No. 22,400
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CHARLES H. LUNDQUIST,
Counter-Claimant and Appellant,
vs.
JOE TURNER,
Counter-Defendant and Appellee.

Appeal From the United States District Court
Central District of California.

APPELLANT'S OPENING BRIEF.

INTRODUCTORY STATEMENT.

This action was brought by way of counterclaim for monetary relief based on alleged violations of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78(j)(b)) and Rule 10(b)-5 of the Rules and Regulations of the Securities and Exchange Commission (17 C.F.R. 240.10B-5). Jurisdiction is based on 15 U.S.C. Sec. 78aa and 15 U.S.C. Sec. 77v.

Counterclaimant Lundquist, as a purchaser of \$420,000.00 worth of securities issued under a private offering exemption, sought damages against counterdefendant Turner, another member of the purchasing group,

for secretly selling part of the securities to a friend, secretly pledging the securities in violation of his investment representations, destroying the exemption and making Lundquist's securities worthless.

After a two-day trial, the District Court, without reaching the issues of damages or causation, found that the conduct of Turner was not a violation of Section 10(b) of the Securities Exchange Act of 1934 nor was it a violation of Rule 10(b)-5 nor a violation of Section 17(a) of the Securities Act of 1933 (15 U.S.C. Sec. 77q), and entered judgment against Lundquist on his counterclaim, from which judgment Lundquist has appealed.

STATEMENT OF JURISDICTION.

1. The statutory provisions believed to sustain the jurisdiction of the District Court are Title 15 U.S.C.A. Sections 77v and 78aa.

Title 15 U.S.C.A. Section 77v provides that the District Courts of the United States shall have jurisdiction of offenses and violations under the Securities Act of 1933 and under the rules and regulations promulgated by the Commission in respect thereto and of all suits in equity and actions at law brought to enforce any liability or duty created by the Securities Act of 1933. Such suit or action may be brought in the District where the defendant is found or in the District where the offer or sale took place if the defendant participated therein.

Title 15 U.S.C.A. Section 78aa grants to the District Courts of the United States the same jurisdiction with respect to violations of the Securities Exchange Act of 1934 or the rules and regulations thereunder.

The jurisdiction of the Federal Court is independent of diversity and amount in controversy in such situation.

Deckert v. Independence Shares Corporation,
311 U.S. 282, 61 S. Ct. 229, 85 L. ed. 189
(1940).

This United States Court of Appeals has jurisdiction to review the judgment in question by reason of Title 28 U.S.C.A. Section 1291 which gives jurisdiction to the Courts of Appeals of appeals from all final decisions of the District Courts of the United States and by reason of Title 28 U.S.C.A. Section 1294 which directs that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the Circuit embracing the District Court.

2. The existence of jurisdiction of the District Court arises out of the following pleadings:

(a) The Counterclaim of Charles H. Lundquist ("Lundquist" herein) [Rec. 2]*, which alleges that Turner violated Rule 10(b)-5 in connection with the purchase and sale of a security and in so doing used means or instrumentalities of interstate commerce and the mails [Rec. 20, 21];

(b) The Notice of Appeal [Rec. 120].

*References to the Record on Appeal are cited herein by the abbreviation "Rec." followed by the page number.

STATEMENT OF THE CASE.

A. Statement of the Pleadings.

The case at bar against Appellee Turner arises under Section 10b of the Securities Exchange Act of 1934 and Rule 10(b)-5 of the Rules and Regulations of the Securities and Exchange Commission, 17 C.F.R. 240.10B-5.

The pleadings framing the issues involved in this case are:

- (1) The Counterclaim of Lundquist [Rec. 20] filed as a part of his Answer to First Amended Complaint [Rec. 2];
- (2) Turner's Reply to Counterclaim [Rec. 24].

Since the original action brought by Turner had been dismissed previously, the Pre-Trial Conference Order (which involved many matters unrelated to the Counterclaim) was not used in the trial of the Counterclaim; rather, the Trial Court asked for and received additional briefs and legal memoranda, consisting of:

- (3) Trial Brief of Counterclaimant Lundquist [Rec. 39];
- (4) Turner's "Plaintiff's Legal Memorandum" [Rec. 54];
- (5) Opening Brief of Counterclaimant Lundquist on Questions of Turner's Violation of the Securities Acts [Rec. 62]; and
- (6) Reply Brief of Counterclaimant Lundquist to Turner's Legal Memorandum [Rec. 91].

The Counterclaim is set forth commencing at page 20 of the Record on Appeal, and incorporates by reference portions of the Fifteenth Affirmation Defense in

the Answer commencing at page 13 of the Record on Appeal. The Counterclaim is framed in two causes of action, the first alleging that Turner engaged in conduct constituting a violation of 10b of the Securities Exchange Act of 1934 and Rules 10(b)-5 under that Act, causing Lundquist damage, and the second cause of action alleging that Turner set about to and did wreck United States Chemical Milling Corporation (herein called "the Company") in order to cover up his wrongdoing, and caused Lundquist additional damage. In his Reply, Turner sets up a general denial and urges that the Counterclaim fails to state a claim or a cause of action.

B. Statement of the Facts.

The facts are practically undisputed, and Turner admitted most of the matters upon which Lundquist seeks to establish his right to relief. In the following recitation of the facts, all references to the Reporter's Transcript refer to portions of Turner's own testimony unless otherwise indicated.

(1) The "Private Offering" Debenture Issue.

On about December 1, 1960, Turner signed a Debenture Agreement bearing that date [Ex. B]. ^{HE}~~A~~ received it in the mail, read it, signed it, and mailed it back to the Company [R. T. 24, 25]*.

This agreement was between the Company, as borrower, and fifteen individuals, including Lundquist and Turner, as lenders, and provided for the purchase by the lenders of 6% ten year convertible notes (herein some-

*References to the Reporter's Transcript of Proceedings are indicated by the initials "R. T." followed by the page number(s) of the Transcript.

times called "debentures") of the Company in various amounts for the different lenders. Lundquist was to purchase \$420,000.00 principal amount of notes, and Turner was to purchase \$125,000.00 worth [Para. 2, p. 1 of Ex. B]. Lundquist's \$420,000.00 subscription was comprised of \$120,000.00 cash and \$300,000.00 cancellation of indebtedness [Ex. B, p. 2].

The obligations of each lender, including Lundquist, to purchase the notes was conditional, and the agreement stated in part:

"3. *Conditions.* Your obligation to purchase and pay for the Notes, or cancel indebtedness for the Notes, is subject to the satisfaction, on or before the date of closing, of the following conditions:

"(A) You shall have received from counsel for the Company a favorable opinion, satisfactory to you and your counsel as to:

* * *

"(iii) The exemption of the sale and delivery of the Notes from the registration requirements of the Securities Act of 1933, as amended, * * *

"(B) The representations and warranties contained in paragraph 9 shall be true on and as of the date of closing * * * with the same effect as though such representations and warranties had been made on and as of the date of such closing; * * * there shall exist on the date of such closing no condition, event or act which constitute an event of default as defined in paragraph 8; * * *"

Included among the representations and warranties of paragraph 9 was the following, appearing on page 12 of Exhibit B:

“(F) Neither the Company nor any agent acting on its behalf (i) has offered the Notes or any part thereof or any similar obligation of the Company for sale to, or solicited any offers to buy the Notes or any part thereof or any similar obligation of the Company from, anyone other than yourself, or (ii) will sell or offer for sale the Notes or any part thereof or any similar obligation of the Company to, or solicit any offers to buy the Notes or any part thereof or any similar obligation of the Company from, any person or persons so as to bring the issuance or sale of the Notes within the provisions of Section 5 of the Securities Act of 1933, as amended.”

Included among the events of default was the following language:

“8. *Events of Default.*

“(A) The occurrence of any of the following events will constitute an event of default:

“(5) The Company has made any material representation herein, or otherwise in writing in connection with this Agreement and the transaction hereby contemplated, and any such representation shall prove to have been false in any material respect on the date as of which made;”.

In December of 1960 and prior to the actual issuance of the Debenture, Turner received through the mails a letter from the Company [Ex. E]] which he read [R. T. 42, 43].

This letter advised Turner that the Commissioner of Corporations of the State of California had issued an appropriate permit authorizing the Company to sell and issue its 6% Subordinated Convertible Notes pursuant to the terms and provisions of the agreement dated December 1, 1960 executed by Turner [Ex. B] and further notifying Turner that the closing date would be January 3, 1961, and further advising Turner as follows:

“The Commissioner of Corporations has required, in lieu of the Notes being escrowed with the Commissioner of Corporations as has been required in similar situations, that the Notes and Note Agreement be stamped with a notation to the effect that the Notes may not be transferred without the prior approval of the Commissioner of Corporations. Legal counsel has informed us that the notation of this restriction will appear only on the Notes and Note Agreement and will not apply to any common stock which may be received by you upon subsequent conversion of these Notes.”

The permit of the Commissioner of Corporations [Ex. K] authorized the Company to sell and issue its securities to the fifteen lenders on certain conditions including the following:

“(a) That the notes authorized by paragraph 1 hereof shall not be issued, executed, sold or offered for sale unless and until said notes shall have a legend thereon to the following effect: ‘The sale or issuance of this note is authorized by a permit of the Commissioner of Corporations of the State of California and is subject to all of the terms

and conditions set forth in said permit and the owner of, or person entitled to the notes authorized to be sold and issued by paragraph 1 of said permit shall not consummate a sale or transfer of said notes, or any portion thereof, or receive any consideration therefor prior to conversion until the written consent or permit of the Commissioner of Corporations shall have been obtained so to do.'

"(b) That the owner of, or person entitled to the notes authorized to be sold and issued by paragraph 1 hereof shall not consummate a sale or transfer of said notes, or any portion thereof, or receive any consideration therefor prior to conversion until the written consent or permit of the Commissioner of Corporations shall have been obtained so to do."

Under date of January 3, 1961, the law firm of O'Melveny & Myers, counsel for the Company, issued to Turner and Lundquist and the other lenders named in the agreement of December 1, the legal opinion of said law firm in accordance with the condition set forth in paragraph 3(a) of Exhibit B. This legal opinion [Ex. J] stated in part as follows:

"On the basis of the foregoing examination and in reliance thereon and on all such other matters as we deem relevant in the circumstances, including our understanding that you are familiar with the business and financial condition of the Company, we are of the opinion that

* * *

"(iii) The offering, issuance, sale and delivery of the Notes is exempt from the registration requirements of the Securities Act of 1933,

as amended, pursuant to Section 4(1) thereof, as a transaction by an issuer not involving offering or sale;

* * *

“In rendering our opinion under (iii) above we are relying in your representations contained in paragraph 10 of the Agreement that you are purchasing the Notes for your private personal investment with no intention of reselling or otherwise distributing the Notes and that the shares of Common Stock which you may acquire upon conversion of the Notes will also be acquired by you for your private personal investment or for your own account, with no intention of reselling or otherwise distributing such shares.”

Turner's representations contained in paragraph 10 of the Agreement, referred to in the foregoing legal opinion, are set forth on page 13 of Exhibit B and read as follows:

“10. *Representations of the Purchasers.* Each of you, severally and not jointly, represents and warrants, and in making this sale to you it is specifically understood and agreed, that *the Notes being acquired by you are being acquired and will be taken and received for your private personal investment for your own account with no intention of reselling or otherwise distributing the Notes* and that the shares of Common Stock which you may acquire upon the conversion of the Notes or any part thereof will also be acquired by you for your private personal investment for your own account with no intention of reselling or otherwise distributing such shares. You fully comprehend

that the Company is relying to a material degree on your representations and warranties contained therein and with such realization you authorize the Company to act as it may see fit in full reliance hereon. Each of you, severally and not jointly, does hereby indemnify the Company and agrees to hold it harmless from and against any and all damages suffered, and liabilities incurred by it, including liabilities for attorneys' fees, arising out of any inaccuracy in the representations, covenants and warranties made in this Paragraph 10." (Italics added.)

The Agreement further stated in Paragraph 11 (B) [p. 13 of Ex. B]:

"All covenants and agreements in this Agreement contained by or on behalf of *any* of the parties hereto shall bind and inure to the benefit of the respective legal representatives, successors and assigns of the *parties* hereto, whether or not so expressed." (Emphasis supplied.)

(2) Turner's Undisclosed Deal With Roland.

Prior to signing the Debenture Agreement of December 1, 1960 [Ex. B], Turner made a private agreement with Glenn Roland [R. T. 195] (a close friend of Turner's and who happened to be Secretary and Treasurer of the Company) that \$25,000.00 of the \$125,000.00 debenture purchased by Turner under the December 1, 1960 Agreement would be held for Roland, who was not one of the 15 lenders named in the Agreement. Roland agreed he would pay Turner \$25,000.00 within a certain period of time [R. T. 32-33]. Turner did not tell any of the other fourteen persons

whose names appear on the Debenture Agreement that he was in fact purchasing \$25,000.00 of the \$125,000.00 purchase for Mr. Roland [R. T. 33-34]. Although Turner knew that the debenture issue was subject to the terms of a permit obtained from the California Commissioner of Corporations [R. T. 42], Turner did not advise the California Corporations Commissioner of any of his dealings with Roland [R. T. 44]. Turner also did not notify Lundquist at any time prior to the issuance of the debenture that he had an arrangement with Roland [R. T. 44], nor did Turner ever advise Lundquist or the Company that he had an arrangement with Roland concerning Roland's participation in Turner's debenture [R. T. 45]. Roland paid Turner the \$25,000.00 as agreed a year later [R. T. 49], but by letter dated December 9, 1961 [Ex. F], and by financial statement given by Mr. Turner to his bank on January 18, 1962 [pages 96a and 96b of the deposition of J. R. Montgomery filed in evidence in this case] Turner was still representing that the full \$125,000.00 face value of the debentures were solely his own and he did not disclose Roland's interest therein [R. T. 55, 60].

Lundquist testified that he put \$420,000.00 in cash into the Company, \$120,000.00 of which was put in between December 1, 1960 and January 3, 1961. Lundquist testified he would not had paid in this \$120,000.00 had he not believed the debenture issue was going to go through [R. T. 116-117]. Lundquist testified he converted all of his debentures into common stock of the Company at \$12.00 per share [R. T. 162] within a few months after the debentures were issued [R. T. 117], that he believed the debenture issue was

legal and valid and that on the date Lundquist converted his debentures into stock, he relied upon the opinion letter of O'Melveny & Myers [Ex. J; R. T. 119]. Lundquist further testified that on the date he converted his debentures into stock, he did not believe there was any defect, irregularity or illegality surrounding the debenture issue [R. T. 122] and that he gave up his short term loan position represented by the \$420,000.00 he had advanced to the Company and accepted the subordinated long term debentures in the face amount of \$420,000.00 in reliance on the validity of the debenture issue [R. T. 123] and that he converted his debentures into stock of the Company in reliance upon the validity of the debenture issue [R. T. 123].

There is no evidence in the record that anyone other than Turner and Roland themselves knew of the existence of this deal between Turner and Roland at any time prior to the commencement of this litigation. The District Court was satisfied that Turner did not disclose to anybody the fact that \$25,000.00 of the \$125,000.00 worth of debentures Turner purchased was to go to Mr. Roland [R. T. 224, 225].

(3) Turner's Pledge Agreement With His Bank.

Turner testified that J. R. Montgomery, who was Turner's Oklahoma banker, came out to California to see whether his bank should lend Turner the money to purchase the debentures [R. T. 26]. Turner arranged with the banker to borrow the money for the purchase of the debentures and for the ~~pledging~~ of the debentures when purchased in order to secure the loan [R. T. 27], and by arrangement with the United California Bank caused the debenture to be transmitted to the *pledge*

Oklahoma Bank with whom he had arranged financing [R. T. 34].

Turner never notified the California Corporations Commissioner that he had an arrangement to pledge his entire debenture purchase to the Oklahoma bank [R. T. 44-45], and he never notified Lundquist that he had such an arrangement [R. T. 45], and he never notified the Company prior to the filing of this lawsuit that he had made a pledge to the Oklahoma bank [R. T. 45-46]. Turner testified that the debentures formed only a part of the security for the \$125,000.00 bank loan [R. T. 188], that the bank sent the loan proceeds to the Company and the Company sent the debentures to the bank [R. T. 188].

(4) Expert Testimony That Turner's Conduct Constituted a Violation of the Securities Laws and Rule 10(b)-5.

Graham L. Sterling, Jr., an attorney specializing in securities law, testified at length concerning his experience and qualifications. He testified that he reviewed the Debenture Agreement of December 1, 1960 [Ex. B], the debenture [Ex. C], the O'Melveny & Myers legal opinion [Ex. J] and the permit of the Commissioner of Corporations [Ex. K]. In response to a hypothetical question based upon the foregoing examination and the assumed facts that Turner, who signed the Debenture Agreement agreeing to purchase \$125,000.00 worth, had by oral agreement with Roland agreed that \$25,000.00 of said \$125,000.00 debenture issue was to be purchased by Turner for the benefit of Roland, who had agreed to pay Turner \$25,000.00 therefor in a year, and that Turner omitted to disclose his arrangement with Roland to any of the other fourteen lenders named

in the Agreement, and that instrumentalities of the United States mail and interstate commerce were used [R. T. 206-207], that in his opinion such conduct would constitute a violation of Rule 10(b)-5 [R. T. 209].

Mr. Sterling further testified that the pledge of the \$125,000.00 debenture by Turner to his bank to secure the loan Turner made for the purpose of purchasing the debentures, which pledge was not disclosed to the other debenture buyers and was not preceded by a permit from the California Corporations Commissioner permitting Turner to pledge said securities, also constituted, in Mr. Sterling's opinion, a violation of Rule 10(b)-5 [R. T. 209-211]. Sterling further testified that in his opinion the debenture [Ex. C] is a security under Federal law [R. T. 211-212], and is also a security within the meaning of the California Corporate Securities Law [R. T. 212].

Mr. Sterling further testified that in his opinion, paragraph 11(B) of the loan Agreement [Ex. B] extended to the other purchasers of the debentures the civil remedies afforded under Section 10b of the Federal Securities Exchange Act [R. T. 219].

In response to a further hypothetical question [R. T. 221-222], Mr. Sterling testified that under the circumstances in this case Turner would be an "underwriter" within the meaning of the Federal Securities Act [R. T. 222].

(5) Posture of the Case When the District Court Ruled.

The District Court refused to hear any evidence of causation or damage unless and until it was in a position to hold for counterclaimant on the question of liability [R. T. 224], and the Court stated that unless liability was found under the first cause of action of the counterclaim, there would be no consideration of the other issues in the case [R. T. 179]. The Court asked for briefs on this issue and thereafter made its ruling without further evidence.

The Court found [Rec. 112-114] that Turner had at the time he purchased the debentures in the amount of \$125,000.00, an agreement to transfer \$25,000.00 worth to Roland for \$25,000.00 cash which Roland did pay to Turner thereafter, and that Turner borrowed the \$125,000.00 purchase price for his debentures from two Oklahoma banks and as security for the repayment of said loan, pledged the debentures and other assets to the banks. The Court found that this conduct was not a violation of Section 10b of the Securities Act of 1934, nor of Rule 10(b)-5 of the Rules & Regulations of the Securities Exchange Commission, and was not a violation of Section 17(a) of the Securities Act of 1933. The Court further found that Turner "did not employ a device, scheme or artifice to defraud; did not make an untrue statement of a material fact; did not omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and did not engage in any act, practice or course of business which operated as a fraud or deceit upon counterclaimant in connection with the purchase or sale of a security." The Court further found that Turner was

not an issuer or an underwriter within the meaning of the Securities Act or Rule X-10B-5, and accordingly entered judgment for Turner on the counterclaim of Lundquist.

C. Questions Presented.

The basic question presented is whether Turner's conduct in pledging his debentures and his agreement to sell a portion of the same constituted a use of a manipulative or deceptive device in violation of Rule X-105B5 of the General Rules and Regulations under the Securities Exchange Act of 1934, and Section 10b of the Securities Exchange Act of 1934.

Subsidiary to the issues stated above is the further issue of whether, by reason of his undisclosed agreements with Roland and with the banks to whom he pledged the debentures, Turner was a statutory underwriter within the meaning of the Securities Act.

A second subsidiary issue, and one which appears to be a question of first impression, is whether one subscriber to a securities issue may obtain the benefits of the civil remedy under Section 10b of the Securities Exchange Act by a suit against another purchaser of a part of the same issue, basing his suit upon conduct which would clearly give the corporate issuer a cause of action, where by contract the corporate issuer's rights inured to all purchasers.

SPECIFICATION OF ERRORS TO BE URGED.

1. The District Court erred in holding and deciding that Turner was not a statutory underwriter within the meaning of Section 4 of the Securities Act of 1933, Title 15 U.S.C.A. Section 77b(1) as it existed at the time of the transaction in question and thus Finding No. 10 [Rec. 114] is erroneous, for the reason that Turner had a secret undisclosed agreement with Roland whereby he bought one-fifth of debenture subscription for the benefit and account of Roland, and further, because Turner had arranged to pledge said debenture purchase to his banks and did in fact pledge them simultaneously with his purchase.

2. The District Court erred in holding that Turner's conduct in secretly agreeing to purchase \$25,000.00 worth of his \$125,000.00 debenture subscription for the benefit of Roland was not violative of Section 10b of the Securities Act of 1934 (15 U.S.C.A. Sec. 78b); was not violative of Rule 10(b)-5 of the Rules and Regulations of the Securities Exchange Commission (17 C.F.R. 240.10B-5); and was not violative of Section 17(a) of the Securities Act of 1933 (15 U.S.C.A. Sec. 77q) [Finds. Rec. 113].

3. The District Court erred in failing to find that Turner's pledge of the debentures and his resale of a portion of the same constituted a use of a manipulative or deceptive device in violation of Rule 10(b)-5 of the General Rules and Regulations under the Securities and Exchange Act of 1934, and Section 10b of the Securities and Exchange Act of 1934, 15 U.S.C.A. Sec. 78(j).

4. The District Court erred in failing to hold that Turner did in fact violate Section 5 of the Securities

Act of 1933, 15 U.S.C.A. Section 77(e), in that Turner made use of means or instruments of transportation or communication in interstate commerce and of the mails to offer to sell a security in a manner that required a registration statement to have been filed as to such security, without a registration statement then being in effect.

5. The District Court erred in failing to hold that Counterclaimant Lundquist could assert a cause of action against Turner by reason of Turner's violations of Section 10b of the Securities and Exchange Act of 1934 and of Rule 10(b)-5 under the 1934 Act.

6. The District Court erred in failing to find that Turner violated the California Corporate Securities Law and that such violation constituted a violation of the Securities Exchange Act of 1934 and specifically Rule 10(b)-5 thereunder.

7. The District Court erred in rendering judgment for Turner and against Counterclaimant Lundquist on his Counterclaim.

8. To the extent that the Findings and Judgment of the District Court constitute a holding that the debenture did not constitute a security within the meaning of Rule 10(b)-5 or by definition under the Securities Exchange Act of 1934, said holding and finding are erroneous.

9. The District Court erred in making a finding in the Second Cause of Action [Find. No. 12, Rec. 114] since the Court expressly restricted all evidence to the issue of liability on the First Cause of Action and excluded evidence of damages and evidence bearing on the Second Cause of Action.

SUMMARY OF ARGUMENT.

- A. THE TRIAL COURT IGNORED THE CASE LAW IMPLYING A PRIVATE CIVIL REMEDY FROM VIOLATION OF SECTION 10b AND RULE 10(b)-5.
- B. TURNER'S CONDUCT VIOLATED RULE 10(b)-5, GIVING LUNDQUIST, AS A CO-PURCHASER OF THE SAME SECURITIES ISSUE, A CIVIL REMEDY AGAINST TURNER FOR DAMAGES.
- C. THE CASES HOLD CONDUCT SIMILAR TO TURNER'S VIOLATES RULE 10(b)-5.
- D. CONDUCT OF TURNER ALSO VIOLATED VARIOUS PROVISIONS OF THE SECURITIES ACT OF 1933 AND, THEREFORE, GAVE RISE TO A CAUSE OF ACTION UNDER SECTION 10(b)-5 OF THE SECURITIES EXCHANGE ACT OF 1934.
- E. TURNER'S CONDUCT ENTITLED LUNDQUIST TO RECOVER IN A PRIVATE ACTION UNDER SECTION 10(b) AGAINST TURNER.

ARGUMENT.

A. The Trial Court Ignored the Case Law Implying a Private Civil Remedy From Violation of Section 10b and Rule 10(b)-5.

Federal Courts have given remedies to purchasers and sellers for violation of Section 10(b) of the Securities Exchange Act of 1934, which prohibits the use of manipulative and deceptive devices in securities transactions.

Ellis v. Carter, 291 F. 2d 270 (9th Cir. 1961);

Fischman v. Raytheon Mfg. Co., 188 F. 2d 783 (2nd Cir. 1951);

Hooper v. Mountain States Sec. Corp., 282 F. 2d 195 (5th Cir. 1960);

Errion v. Connell, 236 F. 2d 447 (9th Cir. 1956);

Fratt v. Robinson, 203 F. 2d 627 (9th Cir. 1953).

Within the last 22 years, Federal Courts have concluded that, when Congress enacted the Securities Act of 1933 (15 U.S.C. Section 77a, *et seq.*) and a year later the Exchange Act of 1934 (15 U.S.C. Section 78a, *et seq.*), there should be spun off of certain sections of these companion acts by implication certain civil liabilities for those who violated this legislation. Private rights of action have been implied from sections of the Securities Act of 1933 and the Exchange Act of 1934 in numerous cases, including the following:

Osborne v. Mallory, 86 F. Supp. 869, 878, 879 (S.D. N.Y. 1949), which dealt with both Section 17 of the 1933 Act and Sections 10b and 15(c) of the 1934 Act;

Baird v. Franklin, 141 F. 2d 238 (2nd Cir. 1944), cert. denied in 323 U.S. 737, which dealt with Section 6(b) of the 1934 Act;

Remar v. Clayton Securities Corp., 81 F. Supp. 1014 (D.C. Mass. 1949), dealing with Sections 7(a) to 7(d) of the 1934 Act;

Slavin v. Germantown Fire Insurance Co., 174 F. 2d 799 (3rd Cir. 1949), dealing with Section 10(b) of the 1934 Act.

While the chief purpose of the 1933 and 1934 Acts was to regulate the issuance of securities and transactions upon the national stock exchanges, the courts have extended the civil remedies available to any person anywhere who has been defrauded in a securities transaction whether within or without the organized securities market.

Fratt v. Robinson, supra.

Section 10(b) of the Securities and Exchange Act of 1934 reads:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

By its terms, the foregoing Section 10(b) required a rule of the Securities and Exchange Commission to make the section operative. At this time the Securities Act of 1933 already had a general anti-fraud statute embodied in its Section 17(a), but it was limited to frauds in connection with the sale of securities. Very astutely the Commission in 1942 implemented Section 10(b) of the Exchange Act with its Rule X-10B-5 (now Rule 10(b)-5). This new rule borrowed the language of Section 17(a) of the Securities Act of 1933, but made it applicable to both sellers and purchasers. Rule 10(b)-5 reads:

“It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

“(a) To employ any device, scheme, or artifice to defraud,

“(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

“(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.”

As can be seen, Rule 10(b)-5 presents a more comprehensive and less strict criterion of fraud than that of the common law. Subdivision (b) of the rule makes false statements and half-truths unlawful. It speaks not in terms of fraud and, as a consequence, little if

any proof of *scienter* appears necessary in order to establish a violation. On the other hand, subdivisions (a) and (c) of the rule denounce fraudulent devices, schemes, artifices, practices and courses of business which are used to defraud.

In summary, the factual basis for Lundquist's case is Turner's conduct of purchasing the Debentures with the secret agreement with Roland that he was purchasing part of the same for Roland and immediately pledging the Debentures to the banks as security for a loan used to purchase the Debentures, without informing the Company, Lundquist or any of the other purchasers of the Debentures of the secret pre-existing agreements to do so; and further, in pledging, transferring and agreeing to resell the Debentures in violation of Turner's express representation and agreement that he would not do so. The question to be answered, therefore, is whether these actions on the part of Turner constitute a violation of the Securities Act of 1933 and/or the Securities Exchange Act of 1934.

The elements of a cause of action under the above-quoted Section 10b are as follows:

1. A use of any means or instrumentality of interstate commerce or of the mails,
2. In connection with the purchase or sale of any security, whether registered on a national exchange or not, and
3. The use or employment in connection therewith of any manipulative or deceptive device or contrivance in contravention of the rules and regulations of the Securities and Exchange Commission.

The elements are satisfied in general as follows:

1. *Use of interstate commerce or of the mails.* Turner corresponded by mail and by interstate telephone with his bankers in Oklahoma to negotiate the \$125,000 loan, and in addition mailed to the bankers in Oklahoma his financial statements, the Debentures purchased by him and certain supporting documents. All that is required to satisfy this element of the section is a showing that instruments of interstate commerce or the mails were used, and in connection with that use a fraudulent act occurred. It is not necessary that the mails or interstate commerce be used to transmit the actual fraudulent representation involved. *Errion v. Connell*, 236 F. 2d 447 (9th Cir. 1956); *Ellis v. Carter*, 291 F. 2d 270 (9th Cir. 1961). In any event, Turner testified that he mailed the December 1, 1960 Agreement, containing his representation, back to the company [R. T. 24, 25].

2. *In connection with the purchase or sale of any security, whether registered or not.* It is quite clear, under the facts of this case, that both Turner and Lundquist were purchasers of the Debentures herein and that Turner by prearrangement resold and pledged the Debentures. The actions previously described were therefore in connection with the purchase or sale of the Debentures. There can be no question that the Debentures were in fact securities within the meaning of Section 10(b), because the term "security" is defined by Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C.A. Section 78(c)(10), which provides that the term "security" includes debentures.

3. *The use or employment of any manipulative or deceptive device in contravention of the rules and regu-*

lations of the Securities and Exchange Commission. The appropriate rule here is rule 10(b)-5 of the General Rules and Regulations under the Securities Exchange Act of 1934, and the question then becomes whether or not the conduct of Turner violated the provisions of said rule. This question involves the basis of Lundquist's counterclaim, and will be discussed in detail next.

B. Turner's Conduct Violated Rule 10(b)-5, Giving Lundquist, as a Co-Purchaser of the Same Securities Issue, a Civil Remedy Against Turner for Damages.

The primary purpose of the Securities and Exchange Commission in adopting Rule 10(b)-5 was to prohibit fraud and other unlawful schemes in connection with the purchase or sale of securities. This rule extended a remedy to defrauded seller; the previous remedies were available only to defrauded buyers. *Hooper v. Mountain States Securities Corporation*, 282 F. 2d 195 (5th Cir. 1960). It is quite clear that in adopting this rule, the Commission intended to make its provisions broad and all-embracing. For example, the phrase "any person" is used twice in the rule. It is used in the first sentence to state that it shall be unlawful for "any person" to engage in the prohibited acts and it is used in the last part of the rule to state that any act which operates as a fraud or deceit on "any person" is prohibited. The rule extends its prohibitions to "any person" and extends its protection to "any person"; that is, it is available to both sellers and buyers, and is enforceable against both sellers and buyers.

As previously stated, the primary purpose of the rule is to prohibit fraud in connection with the pur-

chase or sale of securities. However, under clauses 1, 2 and 3, the rule reaches misleading or deceptive activities whether or not they are sufficient to sustain a common law action for fraud and deceit. *Hooper v. Mountain States Securities Corporation, supra*; *Ellis v. Carter, supra*. There need not be an affirmative misrepresentation, nor knowledge of the falsity of the statement made, nor bad faith intent to mislead, in order to make a cause of action under this rule. *Kohler v. Kohler Co.*, 319 F. 2d 634 (7th Cir. 1963). The word "fraud" as interpreted under the securities acts is given a broad, remedial definition and is not limited to the common law elements of deceit. *SEC v. Gulf Intercontinental Finance Corp.*, 223 F. Supp. 987 (S.D. Fla. 1963).

The narrow question then is whether or not Turner's conduct was in violation of any of the three clauses of Rule 10(b)-5 quoted above. It should be noted, however, that the antifraud provisions of the three clauses of the rule "are not intended as a specification of the particular acts or practices which constitute a fraud, but rather are designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others." *In the Matter of Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), 1961-1964 C.C.H. Fed. Securities Law Rptr. Decisions 76,803. The Securities and Exchange Commission has taken the position that the three clauses of the rule should be considered as mutually supporting rather than mutually exclusive, and thus where a duty of disclosure can be established in a given case and a breach of that duty found, all three clauses of the rule may be violated, *In the Matter of Cady, Roberts & Co., supra*.

It should be noted, however, in considering the three clauses of Rule 10(b)-5, that it is only necessary to prove *one* of the prohibited actions in order to make out a case under the rule. *Stevens v. Vowell*, 343 F. 2d 374 (10th Cir. 1965).

Each and all of the three clauses of the rule have been violated by Turner's conduct as follows:

a. *Device, scheme or artifice to defraud.* The device consisted of the overall plan by Turner and Roland whereby Turner would acquire the Debentures with pre-existing scheme of immediately pledging the same to the City National Bank, Lawton, Oklahoma, and Liberty Bank of Oklahoma City, Oklahoma, and reselling a portion of the Debentures to Roland without the knowledge or consent of the Company, Lundquist or any other purchaser of the Debentures. This was in direct violation of the Agreement signed by Turner, Lundquist and all the other purchasers, which provided in part as follows:

"10. *Representations of the Purchasers.* Each of you, severally and not jointly, represents and warrants, and in making this sale to you it is specifically understood and agreed, that the Notes being acquired by you are being acquired and will be taken and received for your private personal investment for your own account with no intention of reselling or otherwise distributing the Notes and that the shares of common stock which you may acquire upon the conversion of the Notes or any part thereof will also be acquired by you for your private personal investment for your own account with no intention of reselling or otherwise distributing such shares.

Turner's secret agreement to sell to Roland and to pledge the Debentures to the banks also violated certain provisions contained in the debenture instruments themselves. The Debentures provided in part as follows:

"This Note is issued pursuant to and is entitled to the benefits of an Agreement dated as of December 1, 1960, between the company and the Payee . . ."

The Debenture further provided:

THE SALE OR ISSUANCE OF THIS NOTE IS AUTHORIZED BY PERMIT OF THE COMMISSIONER OR CORPORATIONS OF THE STATE OF CALIFORNIA AND IS SUBJECT TO ALL OF THE TERMS AND CONDITIONS SET FORTH IN SAID PERMIT, AND THE OWNER OF, OR PERSON ENTITLED TO THE NOTES AUTHORIZED TO BE SOLD AND ISSUED BY PARAGRAPH 1 of SAID PERMIT SHALL NOT CONSUMMATE A SALE OR TRANSFER OF SAID NOTES, OR ANY PORTION THEREOF, OR RECEIVE ANY CONSIDERATION THEREFOR PRIOR TO CONVERSION UNTIL THE WRITTEN CONSENT OR PERMIT OF THE COMMISSIONER OF CORPORATIONS SHALL HAVE BEEN OBTAINED SO TO DO."

Turner's secret agreement to sell to Roland and his receipt of the entire consideration by virtue of his pledge to the bank also violated these provisions.

b. *Make any untrue statement of a material fact or to omit to state a material fact.* Turner's conduct easily

comes within the purview of this section, because he made affirmative mis-statements of fact and also omitted to state material facts. It is clear that Turner affirmatively mis-stated material facts when he signed the Agreement, representing that the Debentures were taken for his private personal investment with no intention of reselling or otherwise distributing the Debentures and then immediately reselling and distributing a portion of the same to Roland and pledging all the Debentures to the Oklahoma banks. The omission to state material facts, of course, was Turner's silence with respect to the other purchasers of the Debentures; that is, his failure to reveal to them that he had a secret scheme to immediately resell and pledge the debentures. The materiality of the mis-statements and omissions to state material facts is proved by Lundquist's testimony to the effect that he relied upon Turner's representations contained in the Agreement, and relied upon the fact that all of the purchasers agreed not to resell or distribute the Debentures, and is also proved by Lundquist's further testimony that he would never have purchased the Debentures had he known of Turner's secret agreements with Roland and with the Oklahoma banks.

c. *Acts, practices or courses of business which operate as a fraud or deceit upon any person in connection with the purchase or sale of a security.* Turner testified in his deposition on June 28, 1965 [which was admitted into evidence on May 4, 1966, as Ex. P], on page 132 as follows:

"Mr. Driscoll. A. Did Mr. Roland ever make a statement to you to the effect that some particular law applied or did not apply to the affairs or

operations of the company or to this debenture issue? A. No.

Q. He never told you that it was legal or illegal or anything like that? A. Not that I know.

Q. Well, I am not trying to trap you, sir, but you did say earlier that the \$25,000 deal had to be kept between you and him, for reasons that you and he discussed. I believe you said that you and he had discussed it. A. Because he didn't want the board of directors to know about it."

Turner's conduct of secretly arranging to resell and pledge the Debentures in spite of his written agreement not to do so, and his failure to reveal the secret agreements to the Company's Board, to Lundquist and the other purchasers were acts which operated upon Lundquist and the other purchasers as a fraud or deceit in connection with the purchase and sale of the Debentures. The fraud consisted of Turner's representations and warranties in the Agreement that he would not resell or distribute the Debentures, and his failure to reveal the material facts concerning the secret agreements, which effectively operated to induce Lundquist to purchase the Debentures. As previously stated, Lundquist testified that he relied on these representations made by Turner in purchasing the Debentures. It is perfectly clear that all the purchasers who signed the Agreement except Turner did so with the express intent to hold the Debentures for investment only and not with the view toward reselling them. Turner had no intention of performing his representations at the time he made them. The lack of intention to perform these representations is what constitutes the fraud. *Keers & Co. v. American Steel & Pump Corp.*, 234 F. Supp. 201 (S.D. N.Y. 1964).

**C. The Cases Hold Conduct Similar to Turner's
Violates Rule 10(b)-5.**

At the outset, it should be noted that section 10(b) and rule 10(b)-5 have been deemed by the Courts to be legislation which is remedial in nature and as such should be liberally construed. *Hooper v. Mountain States Securities Corp.*, *supra*; *SEC v. Gulf Intercontinental Finance Corp.*, *supra*. A number of cases have held that conduct similar to Turner's has constituted a violation of section 10(b) and/or rule 10(b)-5. In the landmark case of *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Penn. 1946), the Court held that a private right of action was available in connection with section 10(b), and that purchasers of stock who failed to disclose secret agreement entered into between themselves and third parties were held to have violated the provisions of sections 10(b). The same situation is present in the instant case; that is, the failure of Turner to reveal his secret agreements with the Oklahoma banks and with Roland. The question is, as stated by the Court in the *Kardon* case, does the conduct in question involve a breach of a duty created by the Act (Section 10(b))? It is submitted that the section created a duty upon Turner to reveal the secret agreement he had made with Roland and the Oklahoma banks in order not to defraud and mislead Lundquist and the other purchasers of the Debentures, who relied on Turner's affirmations that he had no intent to resell the Debentures or transfer them in any manner.

Another recent case has held that the failure to disclose secret agreements in connection with the purchase or sale of securities violated Section 10(b) and/or Rule

10(b)-5. In *Stevens v. Vowell*, 343 F. 2d 374 (10th Cir. 1965), the plaintiff had been told by the defendants that the money he paid for certain securities would be used for specified purposes only. Defendants, however, at the time they made these representations, had agreements with third persons to use the money for entirely different purposes. Plaintiff was not advised of these agreements. The Court found that the plaintiff relied on defendants' representations, and that defendants had concealed certain critical facts from plaintiff concerning the agreements and had made misrepresentations of other facts, and that defendants had used instrumentalities of interstate commerce in their plans and designs, and that the instruments in question were securities within the meaning of 15 U.S.C.A. Section 78c(a)(10), and that the securities were unregistered, and that therefore the defendants had violated both Section 10(b) and Rule 10(b)-5. It is submitted that as previously shown, the same facts concerning reliance upon misrepresentations, concealment of material facts, and use of facilities of interstate commerce are present in the instant case, and that, therefore, the conclusion is inescapable that Turner had violated Section 10(b) and Rule 10(b)-5.

In the Ninth Circuit case of *Ellis v. Carter*, 291 F. 2d 270 (9th Cir. 1961), the defendant's misrepresentations concerning the control of the company in the sale of its securities, upon which the plaintiff relied in purchasing the stock, were held to violate Section 10(b) and Rule 10(b)-5.

One of Lundquist's theories of recovery was that he was defrauded and misled by reason of the fact that Turner breached the provisions of the Agreement, by

immediately reselling a portion of the Debentures in spite of his express representation that he would not do so. In the recent case of *M. L. Lee & Co. v. American Cardboard & Packaging Corp.*, 36 F.R.D. 27 (Ed. Penn. 1964), the Court held that a defrauded person has a valid claim under Section 10(b) and Rule 10(b)-5 where the fraud was in connection with a contract to purchase or sell securities. The fraud in that case consisted of a violation of certain contractual provisions, just as the fraud in the instant case is alleged to be in part Turner's violation of his agreement not to transfer the securities. It should further be noted that in the *M. L. Lee & Co.* case, the Court held that such a cause of action existed even without a consummated purchase or sale of securities; the mere negotiation for a purchase or sale, represented by a contract whose terms were breached, was enough to give rise to a cause of action.

In interpreting the phrase "in connection with the purchase or sale of any security," two recent cases have held that the misrepresentations which violate the rule are not limited only to those relating to the subject matter of the purchase, that is to say, the securities. In the case of *Glickman v. Schwewickart & Co.*, 242 F. Supp. 670 (S.D. N.Y. 1965), the Court held that misrepresentations as to the *financing* of a purchase of securities were actionable under the rule, and that such misrepresentations are *not* limited to those relating to the subject matter of the purchase only. See also to the same effect, *Cooper v. North Jersey Trust Co.*, 226 F. Supp. 972 (S.D. N.Y. 1964). In the instant case, some of the misrepresentations did directly relate to the security, for example, the misrepresentations by

Turner that the Debentures would not be resold, and so are directly within the rule. However, other misrepresentations (or non-disclosures) related to the method of financing Turner's purchase of the Debentures, that is, his failure to reveal that the Debentures would be immediately pledged to the Oklahoma banks in order to provide the purchase price.

The case of *Keers & Co. v. American Steel & Pump Corp.*, *supra*, involved similar facts. In that case, plaintiffs brought a minority interest in the stock of a certain corporation from one Benkert in reliance upon his oral promise that he would not sell his controlling interest in the corporation or take advantage of any other corporate opportunities flowing from his control, unless the opportunity for sale on equally advantageous terms was first made available to all of the stockholders of the corporation. Under the facts of that case, it was clear that Benkert honestly intended to fulfill his promise at the time he made it. However, when Benkert died, his executor violated his agreement. The Court held that there had been no fraud by Benkert because he had honestly intended to fulfill his promise when he made it. The Court stated, however, as follows:

“Where representations are promissory in nature, as here, the promisee may not recover unless there is proof that at the time the promises were made the promissor had no intention in keeping them. The lack of intention to perform is what constitutes fraud.”

The above-quoted language, it is submitted, is applicable to the instant case. When Turner made the representations in writing that he was acquiring the Debentures

for his own account with no intention of reselling or otherwise distributing the same, he had not the slightest intention of performing those representations. The facts in this case are clear. Turner made the representations that he would not resell or distribute the Debentures at a time when he had already entered into agreements to do exactly what he represented he would not do. That he had no intention of performing his representations is shown by his conduct of immediately pledging the Debentures and reselling the same to Roland. It is evident, therefore, that under the language in the *Keers* case quoted above, the representations of Turner were promissory in nature but at the time he made them, he had no intention of keeping such promises, and therefore, that is the gist of the fraud. As previously stated, the element of reliance is supplied by Lundquist's uncontradicted testimony that he would not have entered into the Agreement or purchased the Debentures if he had known that Turner was planning to resell and pledge the Debentures.

D. Conduct of Turner Also Violated Various Provisions of the Securities Act of 1933 and, Therefore, Gave Rise to a Cause of Action Under Section 10(b)-5 of the Securities Exchange Act of 1934.

The preceding section has shown that the acts of Turner described therein constitute the employment of manipulative and deceptive devices giving rise to a cause of action under rule 10(b)-5. However, there is another reason why Turner's conduct is actionable under section 10(b) and/or 10(b)-5, and that is because such conduct also violates various provi-

sions of the Securities Act of 1933. It must be emphasized, however, that is *not* necessary to establish a violation of the 1933 Act in order to make a cause of action under Section 10(b) of the 1934 Act. For example, it is not necessary to show that the resale by Turner of the Debentures in fact violated the private offering exemption under the 1933 Act, in order to come within Section 10(b). The requirements of Section 10(b) and Rule 10(b)-5 have been explained previously. However, Turner did in fact violate the 1933 Act, and this in turn is actionable under the 1934 Act.

Turner's resale of a portion of the Debentures to Roland violated Section 5 of the Securities Act of 1933, 15 U.S.C.A. 77e. That section provides that unless a registration statement is in effect as to security, it shall be unlawful for any person, directly or indirectly, to carry or cause to be carried through the mail or interstate commerce any such security for the purpose of sale or delivery after sale. As previously stated, there was no registration statement in effect in connection with the issuance of the Debentures, because the issue was exempted therefrom by reason of the "private offering exemption" contained in Section 4(2) of the Securities Act of 1933, U.S.C.A. Section 77d(b)(2), which exempts transactions by an issuer not involving a public offering. If, however, one is deemed to be an "underwriter" under the terms of Section 4(1) of said Act, 15 U.S.C.A. Section 77d(1), he is no longer protected by the private offering exemption, and is in violation of the Act.

“Underwriter” is defined in Section 2(11) of the 1933 Act, 15 U.S.C.A. Section 77b(11) as follows:

“The term ‘underwriter’ means any person who has purchased from an issuer with a view to, or offers to sell for an issuer in connection with, the distribution of any securities or participates or has direct or indirect participation in any such undertaking, or participates or has participation in the direct or indirect underwriting of any such undertaking.”

A question has been raised as to whether or not Turner’s pledge of the Debentures is within the meaning of the above-quoted section; that is, did the pledge make him an underwriter aside from the resale to Roland? This question has been answered affirmatively by the case of *SEC v. Guild Films Co.*, 279 F. 2d 485 (2nd Cir. 1960) in which the defendant banks, pledgees of unregistered securities raised this defense. In holding that a pledge transaction should be equated with a sale, the Court said, *supra*, at 489:

“The banks cannot be exempted on the ground that they did not ‘purchase’ within the meaning of section 2(11). The term although not defined in the Act should be interpreted in a manner complementary to ‘sale’ which is defined in section 2-(3) [15 U.S.C.A. section 77b(3)] as including ‘every * * * disposition of * * * a security or interest in a security for value * * *.’”

See S.E.C. Release No. 33-4552 (1962), C.C.H. Federal Securities Law Reporter, para. 2771 “In Public Offering Exemption” to the effect that whether a transaction is one not involving any public offering is es-

entially a question of fact and necessitates a consideration of all surrounding circumstances. See, also, *In the Matter of Skiatron Electronics and Television Corp.*, 40 S.E.C. 236 (1960), [1961-1964 CCH Federal Securities Law Reporter, Decisions, para. 76,719, which held that a certain sale and pledge transaction was in violation of Section 5 of the Securities Act of 1933, 15 U.S.C.A. 77e].

In *S.E.C. v. Mono-Kearsarge Consolidated Mining Co.*, 167 F. Supp. 248 (D.C. Utah 1958), the Court said:

“In effect, the term ‘underwriters’ as defined in the Act includes one who has purchased from any person directly or indirectly controlling an issuer or in direct or indirect common control with the issuer, with a view to the distribution of the security in question.”

It is clear, therefore, from the foregoing that Turner was a statutory underwriter within the meaning of the foregoing rule because he purchased his stock from the issuer Company with the intention of immediately distributing and reselling the same to Roland. There is no evidence to show that Roland, when he took the Debentures, in any manner agreed to hold them for investment only and not with a view to resale or distribution. There was apparently nothing to prevent Roland from reselling his share of the Debentures to anyone he chose. An individual who obtains unregistered stock in a corporation from an issuer with a view to distribution thereof, is an “underwriter” within the meaning of 15 U.S.C.A. 77b(11), quoted above, *S.E.C. v. Bond and Share Corp.*, 229 F. Supp. 88

(D.C. Okla. 1963). The participation by Turner in the transaction was direct; however, even an indirect participation in the distribution would have been enough to bring him within the definition of an underwriter. *S.E.C. v. Culpepper*, 270 F. 2d 241 (2nd Cir. 1959).

It is submitted that the violations of the above-mentioned provisions of the Securities Act of 1933 are also actionable under Section 10(b) of the Securities and Exchange Act of 1934 when the ingredient of fraud is added thereto. In the case of *Fischman v. Raytheon Mfg. Co.*, 188 F. 2d 783 (2nd Cir. 1951), the plaintiffs, who had been induced to buy stock by reason of misstatements in a prospectus, were held to have stated a cause of action under rule 10(b)-5 without regard to whether such an action could be maintained under the appropriate section of the 1933 Act (Section 11, dealing with misstatements in a prospectus). The Court stated that when the element of fraud is added to conduct which is actionable under the section dealing with misstatements in a prospectus, the conduct becomes actionable under rule 10(b)-5 whether or not a suit could be maintained under Section 11. It is submitted that the same situation applies to conduct which is actionable under section 5 of the Securities Act of 1933, that is, Turner's conduct in reselling securities to Roland without a registration statement being in effect and in violation of the private offering exemption, and that when as here, the ingredient of fraud is added, Turner's conduct is actionable under rule 10(b)-5 whether or not a suit could be maintained for a technical violation of the private offering exemption.

E. Turner's Conduct Entitled Lundquist to Recover in a Private Action Under Section 10(b) Against Turner.

It is now firmly established that there is implied civil liability, that is, a private remedy judicially recognized, in connection with section 10(b) of the Securities Exchange Act of 1934, though the Act does not expressly provide for such liability, and even though the conduct may not be actionable in common law, *Kardon v. National Gypsum Co.*, *supra*; *Ellis v. Carter*, *supra*; *Cooper v. North Jersey Trust Co.*, *supra*.

The private right of action under the section and the rule derives from common law tort principles which impose liability for violation of a statute designed to prevent a particular type of harm, *Kardon v. National Gypsum Co.*, *supra*; *Osborne v. Mallory*, 86 F. Supp. 869 (S.D. N.Y. 1949); *McClure v. Borne Chemical Co.*, 292 F. 2d 824, 836 (3rd Cir. 1961). In those cases, recovery was allowed on the basis of the principle set forth in Restatement, Torts, §286. That section reads:

"The violation of a legislative enactment by doing a prohibited act, or by failing to do a prohibited act, makes the actor liable for an invasion of an interest of another if:

(a) The intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and,

(b) The interest invaded is one which the enactment is intended to protect; and,

(c) Where the enactment is intended to protect an interest from a particular hazard, the invasion of the interest results from that hazard; and,

(d) The violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

It has been established above that Turner violated Section 10(b) and Rule 10(b)-5 by doing an act prohibited by those enactments. The issue then is, whether having done this prohibited act, Turner is liable for an invasion of Lundquist's interest.

Each of the subdivisions of Restatement, Torts § 286 is satisfied by the facts of this case. As to (a), it is now clear that Section 10(b) and Rule 10(b)-5 were intended in part to protect the interest of the *buyer* of securities as an individual, *Osborne v. Mallory, supra*; *Fischman v. Raytheon Mfg.*, 188 F. 2d 783, 786-88 (2d Cir. 1951); *Matheson v. Armbrust*, 284 F. 2d 670, 674-675 (9th Cir. 1960). Lundquist is a buyer of securities.

As to (b), the enactments were intended to protect the interest of the investor in trading in a market free of deceptive statements, schemes and devices, *Kardon v. National Gypsum Co., supra*, at 514 (the enactment "discloses a broad purpose to regulate securities transactions of all kinds and, as a part of such regulation, the specific section in question provides for the elimination of all manipulative or deceptive methods in such transactions . . ."). Lundquist is a buyer who engaged in a securities transaction, an "investor"—a member of the class for whose special benefit the statute was enacted, *Kardon, supra.*, at 514; *Cooper v. North Jersey Trust Co. of Ridgewood, New Jersey, supra.*

As to (c) and (d), Turner fraudulently misrepresented in connection with the sale of the Debentures to Lundquist that Turner was taking the same for investment, and Lundquist relied upon that representation in deciding to take his own allotment. The hazard the enactments contemplated has been effected by Turner—the misrepresentation resulted in a purchase of securities, a purchase which would not have been made but for the representation. This also establishes causation, that is, the violation was a legal cause of the invasion of Lundquist's interest.

Nor can it be successfully argued that the plaintiff can only sue his immediate seller, and not another buyer, such as Turner. Restatement, Torts, § 286 does not require "privity of contract," it has been held that "it would be an unwarranted constriction of the broad protection contemplated by the federal scheme of securities legislation to engraft upon that scheme a requirement (privity) that is neither part of the statute (Section 10(b)) nor a part of the governing common law tort principles contained in the restatement," *Miller v. Bargain City U.S.A., Inc.*, 229 F. Supp. 33, 37 (E.D. Penn. 1964). Other cases have held that direct privity is not required, *Cochran v. Channing Corp.*, 211 F. Supp. 239 (S.D. N.Y.); *Fischman v. Raytheon Mfg. Co.*, *supra*; *Texas Continental Life Insurance Co. v. Bankers Bond Co.*, 187 F. Supp. 14 (W.D. Ky. 1960); reversed on other grounds, 307 F. 2d 242 (6th Cir. 1962). ("The defendants argue strenuously that plaintiff should be denied recovery because there was no privity between plaintiff and the defendant at the time of the sale. The court is of the opinion that such a fact is not material under the statute.")

Two recent cases have effectively disposed of this issue: *Miller v. Bargain City, U.S.A., Inc.*, 229 F. Supp. 33 (E.D. Penn. 1964) and *New Park Mining Co. v. Cramer*, 225 F. Supp. 261 (S.D. N.Y. 1963). The Court in *Miller, supra*, said, at 38:

“Nor is a defrauded buyer or seller limited to an action against the other party to the transaction.”

In *Miller, supra*, there was no showing that the defendants were sellers, at 225 F. Supp. 36, but there was a showing that the defendants filed false reports and statements with the Securities and Exchange Commission, and the plaintiff, in reliance upon those reports, purchased securities on the over-the-counter market. It was held that it was not necessary that the defendants be the sellers to the defrauded buyer, rather, it was enough to sustain the cause of action based on Section 10(b) and Rule 10(b)-5 that the defendants did these acts “in connection with” the plaintiffs’ purchase.

In *New Park Mining Co. v. Cramer, supra*, the Court said, at 266:

“A purchaser or seller of stock is not limited under section 10(b) and rule 10(b)-5 to an action against the other party to the purchase or sale; he can sue a third person if in connection with the purchase or sale that person defrauded him.”

This case held that where the defendants caused the plaintiff corporation to purchase 160,000 shares of another company, while taking shares free for themselves, it was not necessary that the corporation sue only the actual seller, because the action could be brought against the person who defrauded the corporation in connection with the sale. Lundquist purchased securi-

ties in reliance upon a representation by Turner that all the other shares sold would be taken for investment. In the *New Park* case *supra*, the plaintiff corporation purchased 160,000 shares in reliance upon the assumption that all other shares sold by the seller would be sold for a good and valuable consideration, and that the seller would take no action which would destroy the plaintiff corporation's investment.

Upon facts similar to those in the *Miller* case, *supra*, the Second Circuit unanimously held in *Fischman v. Raytheon Mfg. Co.*, *supra*, that an action under the rule could be maintained by *common* stockholders who had bought their stock in reliance upon a false registration statement used in the sale of *preferred* stock. In *H. L. Green Co. v. Childree*, 185 F. Supp. 95 (S.D. N.Y. 1960), it was held that defendants who prepared false financial statements as certified public accountants were not entitled to dismissal of the action on the ground that they did not participate in the sale induced by the use of the financial statement. In *Pettit v. American Stock Exchange*, 217 F. Supp. 21 (S.D. N.Y. 1936), a motion to dismiss the action against the Exchange was denied even though the Exchange was not the ultimate seller but was merely the conduit through which the sale was consummated.

It is apparent that the trend of the decisions is toward a literal interpretation of the language in Section 10(b), Rule 10(b)-5 by holding unlawful various acts "in connection with the purchase or sale of any security". With specific emphasis on the quoted language, it has been stated "that the outlawed activity is not limited to the portion of the transaction involving an exchange of consideration by the purchaser for the stock," *Cooper*

v. North Jersey Trust Co. of Ridgewood, N.J., supra (held that the purchaser could sue a pledgee who converted the plaintiff's stock even though the pledgee did not actually exchange consideration with plaintiff in a purchase and sale transaction). In *Glickman v. Schweickert & Co.*, 242 F. Supp. 670 (S.D. N.Y. 1965), a motion to dismiss by the defendant securities broker was denied where the complaint alleged that the broker represented to the plaintiff that the purchase of shares by means of a "factoring-device" was usual and proper, and did not inform the plaintiff that it violated the margin requirements of the Securities Exchange Act of 1934. In that case, the defendant argued similarly to *Cooper v. North Jersey Trust Co.* that the misrepresentation to which Section 10(b) relates is a misrepresentation relating to the subject matter of the purchase itself—the sale of securities, and since he made no misrepresentation as to the securities or their value, that there was no right of action under Section 10(b). The Court held that the words "in connection with" in Section 10(b) "need not be limited to misrepresentations relating to the subject matter of the purchase," *Id.* at 674, expressly following *Cooper v. North Jersey Trust Co.*

In short, it is apparent from the foregoing cases that any fraud "in connection with" a purchase of Securities is actionable under Rule 10(b)-5 even though the defendant is not a seller. This is so because (1) the Restatement section which is the basis for private actions under Section 10(b) and Rule 10(b)-5, does not require "privity", *i.e.*, does not require a buyer-seller relationship; (2) the recent cases cited above do not limit the enactments to suits against the other party

to the transaction, and (3) the trend of the decisions is toward an interpretation of the enactments which makes any fraud "in connection with" the purchase of securities actionable, even though the party defendant is not a seller who made misrepresentations directly relating to the security.

Summary and Conclusion.

The undisputed facts produced at the trial of this action should have resulted in a ruling that Lundquist was entitled to proceed to put on his evidence of causation and damages flowing from Turner's blatant violation of Rule 10(b)-5. Instead, the District Court ignored the many decisions granting a private civil remedy for violation of the Securities Acts and the Rules thereunder, and erroneously cut the trial short and found against Lundquist. The errors of the lower Court can and should be corrected by reversing the judgment and remanding the case with instructions to proceed to determine the amount of Lundquist's damages.

Respectfully submitted,

HURLEY & DRISCOLL,

By ROBERT W. DRISCOLL,

Attorneys for Appellant Lundquist.

Certificate.

I certify that, in the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT W. DRISCOLL

NO. 22400

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES H. LUNDQUIST,

Appellant,

vs.

JOE TURNER,

Appellee.

FILED

FEB 28 1968

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BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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BRIEF OF APPELLEE

THE FACTS

The following facts are undisputed:

1. JOE TURNER was one of fifteen individuals who either advanced funds to or cancelled an indebtedness of UNITED STATES CHEMICAL MILLING CORPORATION (U. S. C. M.), in return for subordinated, convertible debentures.

2. JOE TURNER received \$125,000.00 of debentures (under 10 percent) in return for \$125,000.00 cash.

3. Another of the individuals who advanced funds to U. S. C. M. in return for such debentures was counter claimant, CHARLES H. LUNDQUIST. Mr. Lundquist received \$420,000.00 of debentures in return for \$120,000.00 cash and the cancellation of a \$300,000.00 indebtedness owed by the Corporation to Lundquist

(see Transcript, Vol. 2, pp. 113-114).

4. JOE TURNER was never an officer or director of U.S.C.M. (Tran., Vol. 2, pp. 114-115).

5. At the time of the issuance of the debentures, and for many years prior thereto, CHARLES H. LUNDQUIST was president and a member of the board of directors of U.S.C.M. (Tran., Vol. 2, pp. 123-124).

5. One of the documents signed by JOE TURNER contained a recital that the note he was acquiring was being acquired and would be taken and received by him for private, personal investment for his own account, with no intention of reselling or otherwise distributing.

6. JOE TURNER pledged the \$125,000.00 of debentures issued to him to two Oklahoma banks, which financed his acquisition of the debentures.

7. At or prior to the time of issuance of the debentures, U.S.C.M. received knowledge that Mr. Turner's acquisition of the debentures was being financed by the Oklahoma banks and that the debenture was being pledged by Mr. Turner to the Oklahoma banks. U.S.C.M. had knowledge of the above by reason of the fact that the \$125,000.00 was paid to U.S.C.M. directly by the Oklahoma banks and U.S.C.M. delivered the \$125,000.00 debenture directly to the Oklahoma banks. (Tran., Vol. 2, p. 109 and 187-188, and Findings of Fact 4, 5, and 6 in Tran., Vol. 1, p. 113).

8. The debenture was only part of the assets which Mr. Turner pledged to the Oklahoma banks as security for the payment

of the loan which enabled Mr. Turner to purchase the debenture (Finding 5).

9. Thereafter, Mr. Turner repaid the Oklahoma banks the \$125,000.00 which he had borrowed to finance purchase of the debenture and the debenture was returned to Mr. Turner by the banks. (Tran., Vol. 2, p. 189. See also Finding 7).

10. \$25,000.00 worth of the \$125,000.00 debenture was acquired by Mr. Turner pursuant to an oral understanding with GLEN R. ROLAND, who was an officer of U.S.C.M., that at some future date Mr. Turner would transfer said \$25,000.00 worth of the debenture to Mr. Roland in consideration for the receipt by Mr. Turner of \$25,000.00 from Mr. Roland (Finding 2).

11. The year following the issuance of the debentures, Mr. Roland did pay Mr. Turner the \$25,000.00, without interest (Finding 3).

12. The \$25,000.00 worth of the debentures was never transferred by Mr. Turner to Mr. Roland because sometime after the debentures were issued, it became apparent that U.S.C.M. was in serious financial difficulty and that the debentures would be worthless (Tran., Vol. 2, p. 59 and pp. 189-190).

Although the above facts are not in dispute, the inferences to be drawn therefrom are in dispute.

THE ISSUES

Furthermore, the following questions, among others, are in dispute:

1. Did Mr. Turner's conduct constitute a violation of his agreement with U.S.C.M. ?

2. Did Mr. Turner's conduct constitute a violation of any Federal Securities Regulation?

3. If Mr. Turner's conduct did constitute a violation of his agreement with U.S.C.M. or constituted a violation of a Federal Securities Regulation, does CHARLES H. LUNDQUIST have a possible claim for damages against Mr. Turner?

4. If CHARLES H. LUNDQUIST has a possible claim against Mr. Turner, has Mr. Lundquist proved:

A. That he acted in reliance upon the above mentioned recital?

B. That his reliance was justified?

C. That the subject matter of the recital was material?

D. That Mr. Turner's breach of the recital, if any, was a material breach?

INTRODUCTORY ANALYSIS

The gist of counter claimant's grievance is that JOE TURNER pledged his debenture to two Oklahoma banks and that JOE TURNER agreed to let GLEN R. ROLAND receive, at some future

date, \$25,000.00 worth of the \$125,000.00 debenture which Mr. Turner received.

It is our contention that since there never was an actual transfer of the \$25,000.00 worth of debenture to Mr. Roland, that Mr. Turner's informal agreement to transfer that amount of the debenture to Mr. Roland did not constitute a sale to Mr. Roland and, therefore, is of no legal significance. We further contend that Mr. Turner's pledge of the \$125,000.00 debenture to the two Oklahoma banks was not a sale or distribution of the debenture as those terms were used in the recital.

However, even assuming that it could be held that Mr. Turner's agreement with Mr. Roland or that his pledge of the debenture to the Oklahoma banks placed Mr. Turner in a technical violation of the terms of the recital, any such purported violation would not give Charles H. Lundquist any claim against Joe Turner.

Of what real significance is it that Joe Turner informally agreed to let Mr. Roland have \$25,000.00 worth of the debentures upon payment by Mr. Roland of that sum at some future date? Mr. Roland was an officer of U.S.C.M. But Charles H. Lundquist was president of U.S.C.M., and Charles H. Lundquist was not the only officer or former officer or director of U.S.C.M. to participate in the debenture issuance. Hence, what difference would it have made if there were sixteen debenture holders instead of fifteen?

It should be obvious that the purpose of the recital that the debenture holders were acquiring their debentures for their own

private investment was to attempt to preserve the private offering exemption. Obviously, the recital was an attempt by U.S.C.M. to limit the likelihood of a public distribution of the debentures by the holders, or to in some way immunize U.S.C.M. from liability if any of the holders did publicly distribute the debentures, thereby endangering the private offering exemption.

But surely it cannot be contended that a transfer of \$25,000.00 worth of debentures to Glen R. Roland would destroy the private offering exemption. Since any agreement by Mr. Turner to transfer some of his interest in the debenture to Mr. Roland would not destroy the private offering exemption, Mr. Turner's conduct did not invalidate the debentures, contrary to the unsupported assertion by Mr. Lundquist's counsel that Mr. Turner "destroyed" the exemption from registration.

Similarly, the fact that Mr. Turner pledged the debenture as security for the payment of the loan and thereafter paid off the loan and received back the debenture likewise did not destroy the private offering exemption. This being the case, the validity of the debentures was not affected by Mr. Turner's pledge. And, in any event, the validity of Charles H. Lundquist's debentures certainly was not affected by Mr. Turner's pledge.

Thus, what Mr. Lundquist's case boils down to is the contention that conduct by Mr. Turner, which may or may not have constituted a technical violation of the recital that the debentures were being acquired for private investment, enables Mr. Lundquist to obtain relief against Mr. Turner. Yet Mr. Lundquist cannot show

that the debentures were invalidated by reason of Mr. Turner's conduct, or that Mr. Lundquist's debenture was invalidated by reason of Mr. Turner's conduct.

Further, even if the debentures were invalidated by Mr. Turner's conduct (and we emphatically deny that they were) we fail to see how Mr. Lundquist (as distinguished from U.S.C.M.) would have any claim against Mr. Turner in any event.

THE CASES DO NOT HOLD THAT CASES SIMILAR
TO TURNER'S VIOLATE RULE 10 (b) - 5

Commencing at p. 32 of his opening brief, counterclaimant makes the totally inaccurate assertion that "a number of cases have held that conduct similar to Turner's has constituted a violation of Section 10 (b) and/or Rule 10 (b)-5."

The first case cited in support of this erroneous statement is Kardon v. National Gypsum Co., 69 F.Supp. 512 (E. D. Penn. 1946). Counter claimant asserts that the case involved purchasers of stock who failed to disclose a secret agreement entered into between themselves and third parties. In fact, what the complaint alleged in that case was that defendants falsely represented to plaintiffs that no negotiations were pending for the sale of the assets of the corporation, and that the plaintiffs sold their stock in the corporation to defendants for far less than the true value of the stock. The complaint also alleged that defendants engaged in various acts of fraud which operated to induce the plaintiffs to sell

their stock. Hence, it is apparent that what the plaintiffs sought to prove in that case was that the corporation's agreement to sell its assets increased the value of the corporation's stock and that because the agreement was not disclosed to plaintiffs, they sold their stock in the corporation for far less than fair value. We fail to see how the facts of that case are even remotely similar to those of the instant case. Kardon involved the common situation of a buyer of stock failing to disclose to the seller facts that had an effect upon the worth of the corporation whose stock buyer was purchasing.

The next case cited by counter claimant is Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965). Counter claimant characterizes that case as involving a situation where "the plaintiff had been told by the defendants that the money he paid for certain securities would be used for specified purposes only."

The facts of Stevens, as set forth in the opinion of the Court, were as follows:

"Stevens and Moad had represented to Vowell that the entire amount of his investment (\$20,000.00) would be used for the construction of the Archery Lanes in Utah. The evidence further discloses that Worldwide had received approximately \$400,000.00 from investors such as Vowell and it had built no Archery Lanes in any locality."

In other words, Vowell was one of many investors who had invested large sums of money in reliance on the representation that the money would be used to build archery lanes, whereas in fact

the promoters siphoned off the funds for their own purposes. Surely that case is not remotely similar on its facts to the instant case.

The next case cited by counter claimant on behalf of his erroneous assertion that conduct similar to Turner's has been held to violate Rule 10 (b)-5 is Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961). In that case it was alleged that Carter sold 10,000 shares of Republic stock to Ellis at \$10.00 a share, at a time when the market price of the stock was \$8.50 a share, and that Ellis in buying was relying on the representation that the stock carried with it a voice in the management of the company. According to the allegations of plaintiff, defendants thereafter gained control of the corporation and excluded plaintiff Ellis from having any voice in the management.

This writer fails to see how a case involving a false representation by the seller of stock that the buyer would have a voice in management of the corporation is even remotely similar to the instant case.

The next case cited by counter claimant is M. L. Lee & Co. v. American Cardboard & Packaging Corp., 36 F.R.D. 27 (E.D. Penn. 1964). Counter claimant asserts that "the fraud in that case consisted of a violation of certain contractual provisions, just as the fraud in the instant case is alleged to be in part Turner's violation of his agreement not to transfer the securities."

Let us, however, examine the exact nature of the contractual provisions that were alleged to have been violated in that case. The

case involved a counterclaim by a corporation and its shareholders against plaintiff underwriters, alleging that in reliance upon an agreement by the underwriters to handle the proposed public offering of the corporation's stock, the corporation spent a great deal of money in anticipation of going through with the public offering, but that the underwriters for no explained reason refused to go ahead with the underwriting. This writer fails to see how the facts of that case are even remotely similar to those of the instant case.

The next case cited by counter claimant is Glickman v. Schweickert & Co., 242 F.Supp. 670 (S.D. N.Y. 1965). Counter claimant characterizes that case as one where "the court held that misrepresentations as to the financing of a purchase of securities were actionable."

But let us examine the facts of Glickman. The case involved whether or not motions to dismiss should be granted. Count 1 alleged that to induce plaintiff to buy more stock than margin requirements permitted, defendant's security broker advised plaintiff to factor the stock to First Discount Corporation. Discount Corporation wrongfully converted and sold the stock and thereafter became insolvent. Thus, it should be noted at the outset that the wrongful conduct was a security broker's attempt to evade the margin requirements. With respect to said Count 1, the court said:

"Thus the only harm which Section 7 (c) of the 1934 Act was designed, generally, to prevent was that which might befall an investor should he

'spread himself too thin' and should the market fall, resulting either in the loss of pledged security or subjection to suit for inability to pay back loans . . . conversion of the pledged stock by the financing institution, however, was not the type of risk covered by Section 7 (c). "

The Court, therefore, dismissed Count I.

Count 4 contained an allegation that defendant misrepresented that the means of financing that it recommended was usual, proper and involved no more risk than the usual margin transaction. Count 4 contained the further allegation that defendant security broker had knowledge that First Discount Corporation was unstable and engaged in questionable financial operations, but that it did not disclose these facts to plaintiff.

We fail to see how Glickman, which involved allegations of a security broker's misrepresentation and evasion of the margin requirements, is similar to the conduct which counter claimant complains of in this action.

And the final case cited by counter claimant in connection with his unsupported assertion that conduct similar to Turner's has been held to violate Rule 10 (b) -5 is Keers and Co. v. American Steel and Pump Corp. , 234 F.Supp. 201 (S. D. N. Y. 1964). In that case the court dismissed the complaint on the ground that there was no federal jurisdiction. We fail to see how either the facts or the ruling in that case in any way assist counter claimant.

TURNER DID NOT VIOLATE ANY PROVISIONS
OF THE SECURITIES ACT OF 1933

Counter claimant's second contention is that Turner violated various provisions of the Securities Act of 1933, thereby giving rise to a cause of action under Section 10 (b)-5 of the Securities Exchange Act of 1934 (Counter claimant's opening brief, pp. 36-40).

The specific contention advanced by counterclaimant in that portion of his brief is that Turner became an "underwriter" under the terms of Section 4 (1) of the Securities Act of 1933, thereby taking the debenture issue out of the private offering exemption.

It is true that an "underwriter" as defined in Section 2 (11) of the 1933 Act, is a person who has purchased from an issuer with a view to distribution of securities.

Counter claimant asserts that Mr. Turner's pledge of his debentures (along with other assets) to the Oklahoma banks made Mr. Turner an underwriter. In support of this contention, several cases are relied on. The first is S.E.C. v. Guild Films Co., 279 F.2d 485 (2nd Cir. 1963). We fail to see how that case assists counter claimant.

The Guild Films case involved a pledge of stock under circumstances where it was obvious at the time of the pledge that the pledgor would default under his loan and that the pledgee would have to sell the pledged stock to the public. The holding in the case was merely that before making a public offering of the pledged

stock, the pledgee would have to comply with federal registration laws. We agree with the rationale implicit in the Guild Films case that a distribution to the public cannot be exempted from the registration requirements by the subterfuge of a sale of stock to one person (thereby seeking to come within the private offering exemption), under circumstances whereby it is intended that the purchaser pledge the stock, and default on the debt, thereby enabling the pledgee to make a public offering of the stock. Such a subterfuge for the purpose of evading the registration requirements certainly cannot be condoned. However, it should be apparent that such a situation has no application to this case. There was no public distribution of the pledged debentures by the Oklahoma banks. Nor was there even any default by Turner in repayment of the loan for which the debentures were, along with other assets, pledged as security. In fact, the record shows that Turner repaid the loan and that the debentures were thereafter returned to him.

The next authority cited by counter claimant is SEC Release No. 33-4552 (1962), C. C. H. Federal Securities Law Reporter, para. 2771, to the effect that in determining whether a transaction comes within the private offering exemption, whether a transaction is one not involving any public offering is essentially a question of fact.

In the instant case the Court heard all of the evidence relative to the issue of liability, and after hearing all of the evidence on that issue the court made findings of fact 3, 4, 5, 6, 7 and 11 (Tran., Vol. 1, pp. 113-114).

Summarized, these findings are as follows:

At the time of the purchase of the debentures Turner had agreed to thereafter transfer \$25,000.00 interest in said debentures to Glen R. Roland, an officer of U.S.C.M.;

That subsequent thereto plaintiff did receive \$25,000.00 from Mr. Roland; that the \$125,000.00 used by Turner to purchase the debentures was obtained by a loan to Turner from two Oklahoma banks;

That as security for the repayment of said sum Joe Turner pledged said debenture and other assets to two Oklahoma banks;

That said debenture was transmitted by U.S.C.M. directly to said Oklahoma banks;

That thereafter Joe Turner repaid said banks all sums owing as a result of said loan and said debenture was returned to Joe Turner;

That Joe Turner in acting as above described was not an issuer or underwriter;

And that in acting as above described Joe Turner did not make a public offering of the aforesaid debenture and did not make an offering to the public of the aforesaid debenture.

Counter claimant concedes in his brief that the question is one of fact. The finding of fact was that there was no public offering by Turner. Unless counter claimant can show that this finding was unsupported by substantial evidence, or was an abuse of discretion, that finding must be sustained on appeal. Counter claimant failed to present to this Court, and failed to present to

he trial court, any decisions of any Court, appellate or trial, to the effect that in cases involving conduct truly similar to the conduct in which Mr. Turner engaged, the Courts have held that a pledge constituted a public offering.

The next case relied on by counter claimant is In the Matter of Skiatron Electronics and Television Corp., 40 SEC 236 (1960). Counter claimant characterized that case as involving a holding that "a certain sale and pledge transaction was in violation of Section 5 of the Securities Act of 1933". Counter claimant neglects, however, to state exactly what that certain sale and pledge were.

Now let us examine exactly what that "certain sale and pledge transaction" was. In Skiatron the person to whom stock was issued had a pattern of immediately pledging the stock as collateral for loans, defaulting on the loans shortly thereafter, and thereby permitting the pledgee to sell the pledged stock to the public. In that case hundreds of thousands of shares of stock had been sold to the public by various pledgees. The Court held that in those circumstances, sale of the pledged stock without registration violated the Securities Act.

Does counter claimant seriously contend that Joe Turner's pledge of a debenture to two Oklahoma banks, thereafter paying off the loan and reacquiring the debenture, is even remotely analogous to the conduct in Skiatron? It is apparent that in Skiatron the sale to an individual was merely a subterfuge by which a public distribution of stock was effected without registration. That was hardly the situation in the instant case.

The next case cited by counter claimant is SEC v. Mono-Kearsarge Consolidated Mining Co., 167 F.Supp. 248 (D.C. Utah 1958).

It is true that said case indicates that an underwriter is one who purchases with a view to distribution. But the question is, what constitutes a distribution? After citing that case, counter claimant asserts that "It is clear, therefore, from the foregoing that Turner was a statutory underwriter within the meaning of the foregoing rule because he purchased his stock from the issuer company with the intention of immediately distributing and selling the same to Roland." However, counter claimant gets no support for that erroneous statement from the above Mono-Kearsarge case. That case involved, in the language of the opinion of the Court, "the transfer to Boren of the 962,000 share block ... Boren intended to effect a public distribution ... there was a public offering."

Thus, said case constituted in effect a holding that one who acquires 962,000 shares of stock intending to publicly distribute them is an underwriter. However, that is a far cry from agreeing to transfer a portion of a debenture to one individual or pledging a debenture to two banks as security for a loan which is then paid off, enabling the debenture to be returned to the purchaser. In short, we submit that a "distribution" so as to make one an underwriter, is a public offering of the securities, and not the kind of transfer that occurred in this case. (See our discussion of this later in our brief.)

The next case cited by counter claimant is SEC v. Bond and Share Corp., 229 F.Supp. 88 (D.C. Okla. 1963). That case merely stands for the proposition that an individual who obtains unregistered stock in a corporation for an issuer with a view to distribution thereof, is an underwriter. However, the question is, what constitutes a distribution as that term is used in the Act? It does appear that one who effects a "distribution" as that term is used in the Act, may be an underwriter. But the question which counter claimant neglects to even attempt to answer is, what constitutes a distribution? Certainly SEC v. Bond and Share Corp. is not authority for the proposition that the kind of conduct in which Joe Turner engaged is a distribution as that term is used in the Act. For in that case 613,650 shares of stock were sold to the public through dealers around the country. Does counter claimant mean to contend that Joe Turner's conduct is even remotely similar to sale of 613,650 shares of stock through dealers to the public?

The next case cited by counter claimant is SEC v. Culpepper, 270 F.2d 241 (Cir. 1959). Counter claimant does not indicate the purported holding of that case or its facts or how that case is in any way relevant to the instant one. In that case there were thirteen defendants. The three appellants had effected a public distribution of 343,495 unregistered shares. Another defendant had sold at least 710,623 shares to brokers and dealers who resold to the public. Does counter claimant mean to contend that Joe Turner's conduct is remotely similar to the sale to the public, through brokers and dealers, of in excess of 1,000,000

shares of stock?

The final case cited by counter claimant in this section of his brief is Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2nd Cir. 1951).

Counter claimant characterizes that case as involving plaintiffs who have been induced to buy stock by reason of misstatements in a prospectus. However, counter claimant fails to state the nature of those alleged misstatements. That case on its facts has no similarity with the instant case.

JOE TURNER'S CONDUCT DID NOT DESTROY THE PRIVATE OFFERING EXEMPTION

The recital signed by Turner, which might be called a letter of investment intent, was not a material factor in the transaction. And any non-compliance by Turner with the terms of the recital (we deny that there was any non-compliance) was insubstantial and therefore not material. This cannot be over-emphasized. Unless Turner's conduct destroyed the private offering exemption, the validity of the debentures could not possibly have been affected by Turner's conduct.

And there is no possibility that the private offering exemption was destroyed unless Turner's conduct made him an underwriter. But Turner did not become an underwriter because he made no public offering of his debenture.

As stated in 72 Harvard Law Review, at p. 784:

"Section 2 (11) of the Securities Act defines an 'underwriter' as a person who purchases 'from an issuer with a view to . . . the distribution of any security, or participates in, any such undertaking . . . ' While 'distribution' is not defined in the act, it is clear that it is equivalent to participation in a public offering. "

Since it is obvious that plaintiff Joe Turner's agreement to transfer a portion of the debenture to Roland and his pledge to his two Oklahoma banks was not a public offering, plaintiff was not an underwriter.

Since he was not an underwriter, the debenture issue was not required to be registered under Federal Securities Law. Hence, Turner's conduct in no way affected the validity of the debenture issue.

Further, even if the private offering exemption had been destroyed (it wasn't) we fail to see how anyone other than the issuer would have any claim against Mr. Turner.

THE MATERIALITY OF JOE TURNER'S REPRESENTATION WAS DECIDED BY THE TRIAL COURT

Contrary to the assertion appearing in counter claimant's brief (p. 30), there is no testimony that Mr. Lundquist relied on Mr. Turner's representations or that he would not have purchased the debentures had he known of the agreements with Roland and the

Oklahoma banks. All that Mr. Lundquist testified was that he went ahead with the debenture issuance in reliance on its validity.

Further, even if Mr. Lundquist had testified as counter claimant asserts in his brief, the trial court was free to disregard his testimony. The testimony of a party witness does not have to be accepted by the trier of fact. This should be especially so in this case because Mr. Turner's debenture went directly to the Oklahoma banks from U.S.C.M. Lundquist, as president of U.S.C.M., must therefore have known of the pledge. In any event, such knowledge could have been inferred by the trial court.

But even if Lundquist had no knowledge of Turner's intention, it was for the trial court to decide whether Lundquist would have backed out of the deal if he had known of Turner's intention.

In this connection we think the following language appearing in Ross v. Licht, 263 F.Supp. 395 (S.D. N.Y. 1967), at 408-409 is appropriate in this case:

" ... the identity of the purchasers from plaintiffs does not seem to me to be a material fact ... I do not believe plaintiffs cared who bought their shares, whether Charles himself or someone else."

We submit that Lundquist did not care what Turner might do with his debenture, so long as Turner's conduct would not destroy the private offering exemption.

However, even if Lundquist did care about whether or not Turner intended to pledge his debenture to the banks or to transfer

part of the debenture to Roland, these matters were immaterial. Lundquist might have gone through with the debenture issuance in reliance on a statement by Turner that the moon is made of cheese. And if the moon is not made of cheese, would Lundquist have a claim against Turner? The answer is clearly no. That representation would have been immaterial. No reasonable man would have bought the debenture because of the statement that the moon is made of cheese. Likewise, no reasonable man would have refused to buy the debenture if it had been known that Turner would pledge his debenture or might have an oral agreement to transfer an interest in it to one other person.

As stated in List v. Fashion Park, Inc., 340 F.2d 457 (2nd Cir., 1965), at 462:

"... thus, to the requirement that the individual plaintiff must have acted upon the fact misrepresented is added the parallel requirement that a reasonable man, would also have acted upon the fact misrepresented."

A further discussion of the materiality requirement in Rule 10 (b)-5 actions is set out at pp. 462-463 of the List opinion.

See also Rogen v. Slikon Corp., 361 F.2d 260 (1st Cir., 1966) at 266 and Kohler v. Kohler Co., 319 F.2d 634 (9th Cir., 1963) at 642 which describe as material those facts "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities."

The finding of the trial court (No. 9) was that Turner made no material misstatements. This finding should be upheld by this Appellate Court.

CONDITIONS ON SALE IMPOSED BY CALIFORNIA COMMISSIONER OF CORPORATIONS

In his brief, counter claimant seems to say that Turner's conduct violated the terms of the California Corporation Commissioner's permit, thereby giving Lundquist a claim against Turner.

Assuming only for the purposes of this brief that there may have been a violation of California Corporation law, the question is whether or not counter claimant Lundquist has any claim against plaintiff based on such an alleged violation.

Under California Corporations Code §26101, presumably the California Commissioner of Corporations might have sued to enjoin plaintiff from pledging the debenture. Further, if a pledge of the debenture without the consent of the Corporation Commissioner violated the terms of the permit, Turner might have sued his pledgee for a declaration that the pledge be declared invalid because the pledgee did not obtain the consent of the California Commissioner of Corporations. But how does this right that plaintiff Turner might have to obtain a declaration that the pledge was invalid give counter claimant Lundquist any rights against plaintiff, or anyone else?

The basic question remains, what effect would a violation

y plaintiff have on the issuance by U.S.C.M. of debentures to
Lundquist? Although the contention has not been clearly articu-
lated by counter claimant, apparently it is his contention that he
has been damaged by reason of the acts of plaintiff because the
issuance of debentures to counter claimant somehow would be
invalidated by any violation of the terms of the California permit by
plaintiff.

In the case of Kent v. Kent, 6 Cal. App.2d 488 at 492-493,
the contention was made that since some of the shares of stock
were issued in violation of the terms of the permit, that all of the
stock issued was void. The Court stated:

"There is no apparent reason why the issue
of some shares in violation of the statute should render
void other shares ... the section is clearly limited
to the single effect of declaring void those shares
not issued in accordance with the required permit."

Even if we were to assume that plaintiff's apparent agree-
ment to transfer a portion of the debenture to Roland violated the
terms of the permit, then at worst, that portion of the debenture
which Mr. Turner had agreed to transfer to Mr. Roland would be
void or at least voidable. But what has this to do with Lundquist's
debenture or with the rights of counter claimant Lundquist?

And if a pledge of the stock would violate the terms of the
permit, this might give plaintiff some rights against the pledgee
for not obtaining a consent or possibly might have given the pledgee
some rights against Turner. And if we were to further assume

that the pledgee thereafter sold the debenture without obtaining consent from the California Corporation Commissioner, that the purchasers of the debenture might have some right against the pledgee for selling the debenture without obtaining the consent of the California Corporation Commissioner. But again, the question arises: What has this to do with counter claimant Lundquist or with his debenture?

In conclusion, we submit that any alleged violation of the California Corporation law by Turner might possibly affect his relationship with Mr. Roland or with the pledgee, or with persons who might subsequently purchase the pledged debenture at a foreclosure sale, but that all this certainly has nothing to do with counter claimant Lundquist and gives him no rights against plaintiff.

CONCLUSION

1. Turner did not violate his investment recitals.
2. Even if he did, the violation was unsubstantial.
3. Since Turner's conduct did not destroy the private offering exemption, there isn't even a possibility that Lundquist was damaged.
4. Lundquist did not prove reliance on Turner's investment recitals.
5. The investment recitals were immaterial except insofar as they were designed to prevent Turner from participating in a public offering. Turner did not make a public offering of his

debenture. Therefore, to the extent that Turner's recitals were of material facts, Turner did not violate the recitals.

How counter claimant can blame his loss on plaintiff is beyond this writer's imagination. The debentures became worthless because the corporation went bankrupt. Counter claimant was the president of the corporation and he knows very well why the corporation went bankrupt. It was the business failure of the corporation which counter claimant headed that caused counter claimant's loss.

If anyone has a claim as a result of the debenture issuance, it is Joe Turner who has a claim against Charles H. Lundquist for fraudulently concealing the corporation's financial condition in order to induce Turner to loan Lundquist's corporation \$125,000.00. Regrettably, Mr. Turner has lost his case against Mr. Lundquist, not only on the basis of the statute of limitations.

It might also be mentioned that Lundquist's purported counter-claim is also barred by the Statute of Limitations. However, since the trial court found that Lundquist couldn't prove his case, the trial court never got around to ruling on that, and other defenses available to Turner.

Respectfully submitted,

RICHARD H. LEVIN

Attorney for Appellee
Joe Turner

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Richard H. Levin

RICHARD H. LEVIN

No. 22,400

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES H. LUNDQUIST,

Appellant,

vs.

JOE TURNER,

Appellee.

Appeal From the United States District Court for the
Central District of California.

REPLY BRIEF OF APPELLANT.

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No. 22,400

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES H. LUNDQUIST,

Appellant,

vs.

JOE TURNER,

Appellee.

Appeal From the United States District Court for the
Central District of California.

REPLY BRIEF OF APPELLANT.

ARGUMENT.

In his "Appellee's Brief", Joe Turner says, at page 6, "But surely it cannot be contended that a transfer of \$25,000.00 worth of debentures to Glen R. Roland would destroy the private offering exemption. Since any agreement by Mr. Turner to transfer some of his interest in the debenture to Mr. Roland would not destroy the private offering exemption, Mr. Turner's conduct would not invalidate the debentures. . . ."

This statement shows the failure of appellee Turner to grasp the issue in this case, which is, basically, can a buyer invoke the civil remedy under Rule 10b-5* to re-

*References to Rule 10b-5 are to the Rules promulgated by the Securities and Exchange Commission under the Securities and Exchange Act of 1934 and amendments thereto.

cover from another buyer? The statement by appellee also blithely assumes that a buyer in a private offering situation can parcel out his investment by pre-arrangement to third parties not included in the private offering, despite express representations and warranties that the buyer is buying the entire amount of his purchase for his own investment account. The cases hold that transactions exempt under the 1933 Act are subject to 10b-5.

Hooper v. Mountain State Securities Corp., 282 F. 2d 195, 201 (5th Cir. 1960), *cert. denied* 365 U.S. 814 (1961);

Fratt v. Robinson, 203 F. 2d 627 (9th Cir. 1953);

Rustic v. Werblin, CCH par. 91,637 (S.D. N.Y. Feb. 28, 1966);

Robinson v. Difford, 92 F. Supp. 145 (E.D. Pa. 1950);

Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

Appellee, unfortunately, cites no authority whatsoever for any of his generalizations contained in the "Introductory Analysis" of the brief, pages 4-7, inclusive. Rather, the bulk of his brief is devoted to attempting to distinguish or minimize the authorities cited by appellant in appellant's Opening Brief.

However, 5 new cases are cited by appellee which deserve attention, and it is the purpose of this Reply Brief to rebut the conclusions drawn by appellee from those 5 cases.

1. *Ross v. Licht*, 263 F. Supp. 395 (S.D. N.Y. 1967) at pp. 408-409, is cited by appellee on page 20 of

his brief to show that the identity of the purchaser is not a material fact, and that Lundquist did not care what Turner might do with his debenture, so long as Turner's conduct would not destroy the private offering exemption. In the *Ross* case, the plaintiffs were actually soliciting a sale to the insiders long before the transaction in question, and they were required to first offer their stock to the other shareholders, including the officers, directors and insiders. Thus, this case is a particularly inapt citation. In the instant case, the debenture purchasers expressly represented in Paragraph 10 of the December 1, 1960 Agreement, that they were purchasing for their own account, and expressly agreed not to sell or transfer their stock without first obtaining a permit from the Corporation Commissioner of California, and agreed that the issue was expressly dependent on these representations.

The only evidence offered on the question of the validity or invalidity of the issue of securities was that testimony of Graham Sterling, Jr., who qualified as an expert in securities law, and his testimony clearly favored appellant's contention that the secret sale by Turner to Roland and the pledge to the Oklahoma banks each constituted acts which violated the terms of the Commissioner's permit and rendered Turner liable for civil damages under 10b-5, and made Turner a statutory underwriter.

2. *List v. Fashion Park, Inc.*, 340 F. 2d 457 (2nd Cir., 1965) is cited by appellee at page 1 for the proposition that a reasonable man test is added to the subjective requirement that the individual plaintiff must have acted upon the fact misrepresented. Appellant has no quarrel with this proposition, nor with the rule enun-

ciated in the *List* case, but wishes to point out that the same case contains another quotation which is much more appropriate than the one used by appellee, namely, the language appearing on pages 461-462 which states:

“lack of communication between defendant and plaintiff does not eliminate the possibility that Rule 10b-5 has been violated.” (citing *Cochran v. Channing Corp.*, 211 F. Supp. 239, 243 (S.D. N.Y. 1962) and *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951), *aff’d* 235 F. 2d 369 (3 Cir. 1956).

3. *Rogen v. Slikon Corp.*, 361 F. 2d 260 (1st Cir. 1966) is cited by appellee on the issue of materiality. The case involved the “reluctant” reversal by the appellate court of a summary judgment granted by the District Court in defendant’s favor. The misrepresentations there involved statements as to the business prospects of the corporation, and the plaintiffs signed a contract acknowledging full familiarity with the corporation’s business and prospects, and acknowledged that the plaintiffs “are not relying on any representations or obligations to make full disclosure with respect thereto.” (p. 265). Besides being factually distinguishable, and besides actually sustaining appellant’s position here respecting disclosure rather than appellee Turner’s position, the case is of questionable authority because of the contradictory language it uses emphasizing the closeness of the factual question. In the instant case, Turner made an express written representation to induce the stock sale, and admittedly had a secret deal with Roland which was not to be disclosed to U.S.C.M.’s Board of Directors because Turner and Roland didn’t want the Board to know about it.

4. *Kohler v. Kohler Co.*, 319 F. 2d 624, 642 (7th Cir. 1963) which was erroneously cited by appellee as a Ninth Circuit decision, involved conflicting accounting testimony about the effect of treatment of pension costs and a tax refund. The plaintiff had attended a shareholder's meeting at which the accounting treatment had been discussed. The Court said, at page 641,

“In appraising plaintiff's contentions, we think the duty of disclosure of material facts placed upon corporate insiders such as defendants by Section 78j(b) and Rule X-10B-5 is necessarily limited to an exercise of fair and honest business practices under all the circumstances existing at the time of the transaction.”

Compare the conduct in the *Kohler* case to Turner's blatant disregard of his express written warranty, his secret and fraudulent dealings with Roland designed to keep the Board of U.S.C.M. from discovering Roland's participation, and Turner's multiple violations of the terms of the Corporation Commissioner's Permit, and one must conclude that Turner's conduct was the anti-thesis of “fair and honest business practices.”

The 4 cases cited by appellee above all are cited to support appellee's position that Turner's misrepresentations and concealments were “immaterial” and that even if known by Lundquist would not have changed Lundquist's course of conduct in going through with the purchase of his \$420,000 worth of debentures. This position of appellee is totally without support in the evidence. The only evidence on the point is Lundquist's testimony* that he would not have purchased

*Reporter's Transcript, p. 116, line 16, to p. 123, line 21.

the debentures had he known that the violations had occurred. The trial court refused to permit evidence on causation and damages which would have elucidated this testimony. Surely, the fact that the reputable law firm of O'Melveny & Myers based its legal opinion as to the validity of the issue on the express warranties and representations of the buyers, including Turner's statements contained in paragraph 10 of the December 1, 1960, Agreement, cannot be discounted.

Furthermore, appellee fails to distinguish between "materiality" in a 10b-5 case involving an open-market sale, and "materiality" in a private transaction. This distinction is clearly pointed out in the recent book by Alan R. Bromberg (McGraw-Hill Book Co., 1967), entitled "Securities Law—Fraud—SEC Rule 10b-5" where the author states, at page 199:

"Materiality is one common-law element that is still going strong under 10b-5. It is required by the express language of clause 2 and by the interpretations of the others. If anything, materiality has achieved more prominence as the Rule is applied to subtler or milder cases. Thus, materiality needs to be more pronounced and more carefully measured in open-market transaction because of potential massive liability to hordes of investors who are in fact trading on a variety of data, appraisals, and intuitions. Some sort of reasonable-man, objective test of investment judgment, intrinsic value, or (in the case of a publicly traded security) significant market effect is appropriate. Such tests have been formulated in a variety of different phrases. (citing in the footnote *Rogen v. Ilikon Corp.*, *supra*, and *List v. Fashion Park, Inc.*, *supra*,

cited by appellee Turner). A looser test may be more suitable for affirmative misrepresentations or deliberately deceptive conduct. A looser or more subjective one may also be proper in direct-personal transactions because of the greater ability of one party to appreciate the position of the other. The latter proposition has found some judicial acceptance. In an open-market case, information had to be rather fully developed before it became material, while in a direct-personal one, very tentative information was material."

See also *Janigan v. Taylor*, 212 F. Supp. 794 (D. Mass. 1962), 230 F. Supp. 858 (D. Mass. 1964) (on damages), affirmed 344 F. 2d 781 (1st Cir. 1965), cert. denied 382 U.S. 879 (1965), where the District Court found the undisclosed facts material by reason of the training and experience of the defendant, who must have known the facts to be material to the plaintiff's decision to go through with the transaction. In the instant case, Turner, with substantial business holdings in several States, signed the documents containing express representations which contradicted his own oral and written pre-arrangements with Roland and with the Oklahoma banks, and expressly stipulated that he understood the other parties to the transaction were relying on his representations.

5. The final case cited by appellee which requires analysis is *Kent v. Kent*, 6 Cal. App. 2d 488 at 492-493, cited at page 23 of appellee's brief. This case holds that where some shares are issued in violation of terms of a permit granted by the California Corporation Commissioner, this does not invalidate the remaining shares.

Once again, we are confronted with appellee's failure to grasp the issues involved in this case.

California is a "permit" state, that is, its Blue-Sky laws require that before securities can be validly issued, a proper permit must be obtained from the Commissioner. Permitted securities are thus valid, while those issued without a permit are void.

Corporations Code, Section 26100.

The Federal Securities Act of 1933 is a "disclosure" statute, requiring all securities to be preceded by a registration statement disclosing certain facts regarding the issue. There are certain exemptions from this disclosure requirement, however, including the "intra-state" exemption and the "private offering" exemption, where it is not necessary to file a registration statement with the S.E.C. in connection with certain transactions which fall within the exemptions. However, if the issue does not qualify for the exemption, then the exemption is unavailable, and the security must thus be preceded by a registration statement or it is void as to the whole issue.

Appellee fails to consider this basic difference between the two types of statutes, and thus incorrectly cites the *Kent* case, which is completely irrelevant and inapplicable.

That the pledge by Turner violated the terms of the California Commissioner's permit is apparently admitted by appellee (see Appellee's Brief, pp. 23-24), but appellee asks: What has this to do with appellant Lundquist or with *his* debenture? The answer is, the un rebutted testimony of Graham Sterling, Jr., was that the pledge violated not only the *Guild Films* doctrine, but

the terms of the permit, thus rendering the representations of Turner in the December 1, 1960 Agreement false, making Turner a statutory underwriter, and giving Lundquist a civil remedy under Rule 10b-5, which makes it unlawful for any person

“(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.”

Conclusion.

Appellee Turner secretly conspired with Roland to sell off part of the debenture issue which Turner represented in writing to the other buyers that he was buying for himself alone, for investment and not for resale. Turner further violated the terms of the permit of the California Corporation Commissioner prohibiting a transfer without a further permit, both by his sale to Roland and his pledge to the Oklahoma banks. His conduct thus fell within the ambit of the language of Rule 10b-5, and a civil remedy is afforded to any person who is affected thereby in a securities transaction. Appellant Lundquist was effected, having bought and paid for \$420,000 worth of the same debenture issue in reliance upon the truth of Turner's express repre-

sentations. The District Court, which seemed to be seeking some kind of privity before the Court could bring itself to accept the possibility of liability (although “privity” has all but disappeared from 10b-5 proceedings, according to Bromberg’s book on Securities Law, page 205), erred in preventing Lundquist from proceeding on to the issues of causation and damages, and the District Court prematurely terminated the proceedings by making an incorrect determination on the issue of liability based upon an incorrect view of the law. For these reasons, the judgment of the District Court should be reversed, and the cause remanded with instructions that the District Court try the issues of causation and damages, and find in favor of appellant Lundquist on the issue of liability.

Respectfully submitted,

HURLEY & DRISCOLL,

By ROBERT W. DRISCOLL,

Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT W. DRISCOLL



NO. 22401 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 1956

MANUEL LUNA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL LUNA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF FACTS

Appellant, Manuel H. Luna, was indicted on March 16, 1960, on nine counts alleging violations of Title 21, United States Code, Section 174. Counts One, Three, Five and Seven alleged that Luna sold heroin to an agent of the Federal Bureau of Narcotics. Counts Two, Four, Six and Eight alleged that Luna received, concealed and transported heroin. Count Nine alleged a conspiracy with other co-defendants to sell approximately 64 grams of heroin. After a jury trial, the Honorable Judge Tolin presiding, Luna was found guilty on all counts and he received eight concurrent twenty-

year sentences and, on one possession count, he received a five-year consecutive sentence.

The events which led to the indictment and conviction were as follows:

Ernest Ochoa was an undercover informant for the Federal Bureau of Narcotics. Ochoa had known Luna for over ten years, although perhaps not well enough to know his true name beyond his nick-name [R. T. 764]. ^{1/} In late November, 1959, in the presence of a small group (including Luna and his estranged wife) who were discussing narcotics, Ochoa mentioned that he knew of a good buyer of heroin for whoever had a large quantity to sell [R. T. 708]. Luna then discussed heroin with Ochoa and later Luna said he had a source of potential supply [R. T. 700, 709]. Although Luna later testified that at his first meeting he indicated strong disinclination to sell, he testified that he informed Ochoa he knew of no source to acquire heroin "at the present time, but if I knew, that I would let him know" Luna testified that this encouraging language was only intended as a means to end the conversation [R. T. 639-43].

Within a few days, Ochoa introduced Luna to Mr. Maria, secretly an agent of the Federal Bureau of Narcotics. Ochoa had told Maria that he knew Luna was involved in the narcotics traffic [R. T. 200]. At this meeting, Luna was told that Maria wanted to buy heroin, and was shown some money [R. T. 650]. Maria

^{1/} "R. T. " refers to Reporter's Transcript.

testified that at this meeting Luna readily expressed willingness to sell heroin and discussed the possibilities of arranging a sale to Maria [R. T. 199]. Luna himself admitted in his testimony that at this time he expressed willingness to sell, yet limited to a promise that he would tell Ochoa when he could supply heroin in the event "that somebody might approach us" [R. T. 639-41]. In fact, Luna went far beyond this promise. At this initial meeting, he specifically told Maria he would supply him with an ounce of heroin at a price close to \$500 per ounce, arguing the price was not too high because he had good quality heroin [R. T. 199, 758].

During the ensuing weeks, Ochoa, upon chance meetings at a cafe he and Luna commonly patronized, spoke to Luna about the proposed sale [R. T. 646]. Being desirous of completing an actual heroin transfer, Ochoa, during this period, unsuccessfully attempted to contact Luna by telephoning Luna's estranged wife and leaving messages that the buyer, Maria, was ready and willing to complete the sale. Luna's wife testified to five such calls, asserting (although Ochoa would not confirm this) that Ochoa, besides attempting to contact her husband in order to complete the sale, asked her whether she knew of a supply of narcotics [R. T. 619-29]. Ochoa, by virtue of the above communications, made clear and reiterated that he was an available conduit for sale of a large amount of heroin. Yet neither Mr. Luna nor his wife testified to any pressure exerted, or any pleas or importunings by the Government agents.

Luna, during early January, telephoned Ochoa and arranged

to meet him. At this meeting, Ochoa telephoned Maria, and Luna negotiated with him on the telephone and arranged a further meeting at a cafe [R. T. 224, 711, 719]. At this meeting, Ochoa not being present, Agent Maria asked Luna if he were ready to deal without delay. Luna replied that he was ready to sell [R. T. 107]. After some haggling over price, the sale was agreed upon and completed [R. T. 107-111, 224]. Additional sales were consummated between Luna and Agent Maria, again without any participation of Ochoa, on January 27, February 2 and February 23, 1960. At this last sale, Luna and co-defendants Collins, Pulido and Vasquez were arrested. The total amount sold to Maria by Luna was approximately 186.9 grams at a total price of \$2,100.00.

Collins' testimony revealed that Luna had approached him and requested him to acquire heroin from Tijuana [R. T. 483]; that he had entered into an arrangement with Luna to split the profits from the sales [R. T. 533-34]; that Luna acquired milk sugar and "cut" the heroin acquired from Pulido, Vasquez and others [R. T. 484, 491-93]; and that Luna took the heroin and sold it at a profit.

At trial, Luna admitted all sales to Maria and relied on the defense of entrapment. At this early point in the trial, since entrapment was raised, the trial court gave a preliminary instruction to the jury stating that:

"The policy of the law is that it is not right for law-enforcement people to go about inducing people to commit crimes. Therefore, they cannot do it. And if they do, it is a defense. If an officer

suggests to me that I commit a crime, he cannot talk me into doing it and then arrest me validly and prosecute me for something which arose in his mind rather than mine.

"However, if a person is known or believed on reasonable grounds to be likely to be committing a course of criminal activity, then it is perfectly proper for officers to provide opportunities in order to catch the criminal at his more or less recurring type of offense.

"The whole gist of it is that if the commission of a crime was born first in the mind of the defendant, so that he would have committed it whenever the opportunity afforded, then you may undertake to afford him the opportunity. But if the defendant was a person who would not have committed the crime except for the enticement or suggestion of the law-enforcement person, then the events originated in the mind of the law-enforcement agency, and the defendant would have to be acquitted." [R. T. 766-67].

Then ensued the following colloquy between the judge and defense counsel:

"THE COURT: Does that explain it sufficiently, counsel?

"MRS. KATZ: Very good job, your Honor."

[R. T. 767].

To refute the defense of entrapment by showing pre-disposition of Luna to sell heroin, the government introduced evidence of Luna's reputation in the community. Agent Maria testified that he became aware of Luna's reputation through Ochoa and other members of the community, and testified that Luna had been arrested on a few occasions, dating back twelve years, for narcotics violations [R. T. 763-73]. Ochoa testified that Luna had acquired a reputation in the community for involvement in the narcotics trade [R. T. 784-87].

In addition to the preliminary instructions given during the trial, the judge instructed the jury at length on the essential elements of the offenses charged, on the defense of entrapment and on the government's burden of proving all elements of its case beyond a reasonable doubt [R. T. 826-34-A, 838-39, 842-43]. Defense counsel made no objection to these instructions [R. T. 844].

Although no notice of appeal was filed, leave to appeal was granted Luna pursuant to a motion under Title 28, United States Code, Section 2255.

II

QUESTIONS PRESENTED

Defendant's brief raises the following questions:

1. Considering the evidence in the light most favorable to the Government, was the trial court required to find that, as a matter of law, entrapment was established?
2. Was pre-disposition effectively established by properly admissible evidence of prior arrests and/or reputation of the defendant?
3. Is entrapment, once propounded, a question for the jury; or must the court decide the issues of justification and pre-disposition?
4. Did the instructions mislead the jury into believing the Government did not have the burden of disproving entrapment, so as to constitute plain error?
5. Did the wording of the entrapment instructions mislead the jury into believing that an informant could not be the entrapping force, or that prior criminality precluded entrapment?
6. Were the instructions on the presumptions arising from Title 21, United States Code, Section 174 adequate, or did they connote that possession alone was sufficient evidence to convict for sale, so as to constitute plain error?
- 7.

III

ARGUMENT

- A. CONSTRUING THE EVIDENCE IN THE
 LIGHT MOST FAVORABLE TO THE
 GOVERNMENT, THE EVIDENCE DID
 NOT SHOW ENTRAPMENT AS A MATTER
 OF LAW OR FACT.
-

Due to traditional Anglo-Saxon notions of fair play and decency, our jurisprudence strives to eliminate the sinister figure of the agent provocateur from police detection. It has never been seriously disputed, however, that because certain types of offenses are invariably committed privately with a willing non-complaining "victim", thus rendering detection by normal methods improbable, agents investigating this type of activity are required to adopt some kind of subterfuge presenting the criminal with a tempting opportunity to ply his trade. Especially in the illegal and increasingly troublesome narcotics trade, police deception constitutes the "only successful manner to combat the evil". Trice v. United States, 211 F.2d 513, 516 (9th Cir. 1954). Thus it is clear that the use of undercover agents to provide an opportunity for the commission of a crime, without anything else, provides no semblance whatsoever of entrapment, Lucero v. United States, 311 F.2d 457, 458 (9th Cir. 1962), even if the first overtures came from such agent. Matysek v. United States, 321 F.2d 246, 247 (9th Cir. 1963); Whiting v. United States, 321 F.2d 72 (1st Cir. 1963).

It is true, of course, that at the other extreme, where "undisputed" testimony makes it "patently clear" that an otherwise innocent person was induced to commit the act complained of, the court may find entrapment as a matter of law. Sherman v. United States 356 U.S. 369 (1958). It is at this extreme that Luna necessarily contends this case resides.

The facts brought out at trial show that while Ochoa may have purposefully discussed narcotics with defendant on several occasions, there is no evidence whatsoever of any argumentative persuasions, no appeals directed at a special weakness such as friendship, or physical need for narcotics, or sick or dying friends. On the contrary, Luna never expressed more than the natural hesitancy of the narcotics seller, always keeping his buyer "on the hook" by constant encouragements that he would provide the requested heroin. Ochoa and Maria never expressed any more enthusiasm than the natural great interest of the heroin buyer in acquiring an ample supply of a product which is not always easy to find. The evidence at no point raises any significant similarity with the factual situations which the courts have found to have fulfilled the requisites of entrapment as a matter of law.

Although Luna relies on the leading Sherman case, supra, the facts and decision of that case clearly do not support the contention that entrapment as a matter of law exists here. In Sherman, contrary to the facts of this case, there was no evidence of defendant's reputation as a narcotics seller, and no evidence that he made a profit on the sales he was convicted for. Sherman was an addict

whom the informant met at a doctor's office where Sherman was undergoing a cure for his addiction. After befriending him, and after repeated meetings and constant entreaties, emphasizing the informant's physical pain from lack of narcotics, Sherman was induced to find heroin, share it with the informant and thus return to the habit. Emphasizing these shocking facts, the Supreme Court held that entrapment as a matter of law existed.

In this Circuit, the leading case of Trice v. United States, 211 F.2d 513 (9th Cir. 1954), cert. denied 348 U.S. 900 (1954), is informative. There, defendant's close friend, who was an addict suffering from tuberculosis, was dying in the hospital. This friend had begged defendant for narcotics. A narcotics agent approached defendant as a friend of Trice's dying friend. The dying friend turned out to be an informant who supplied the Agent with a note for Trice requesting narcotics. After telling Trice of the great pain suffered by his friend, the agent convinced Trice to acquire and sell some heroin, which Trice easily did. Despite the probabilities that sympathy was utilized as emotional pressure, and because of sufficient evidence of Trice's pre-disposition to sell narcotics, entrapment was held not to exist as a matter of law.

Similarly, where a Food and Drug Inspector, dressed as a woodsman, pleaded he was having great difficulty sleeping, thus inducing defendant to dispense narcotic pills without a prescription, entrapment as a matter of law was not established. Archambault v. United States, 224 F.2d 925 (10th Cir. 1955). And where an agent pretended to be a drug addict suffering from ailments for

which his former doctor had prescribed and sold narcotics, the physician who then sold him narcotics was held clearly not to have been entrapped as a matter of law. Newman v. United States, 299 F.2d 128 (4th Cir. 1924). See also United States v. Brandenburg, 162 F.2d 980 (3rd Cir. 1947) [Agent faked symptoms of tuberculosis].

In the present case, the agents used subterfuge, yet appealed to no emotional or physical characteristic of defendant. Luna always expressed readiness to sell and went over the details of sale at the first meeting with Maria only a few days after the subject of heroin was first mentioned by Ochoa. That defendant was no innocent stranger initiated into nefarious dealings is evidenced by the fact of his prior arrests; see Carson v. United States, 310 F.2d 558 (9th Cir. 1962; Carlton v. United States 198 F.2d 795 (9th Cir. 1952), his preparation of and the quality of the drugs sold, see United States v. Toy, 273 F.2d 625, 626 (2d Cir. 1960), his willingness to make subsequent sales, see Gonzales v. United States, 251 F.2d 298, 299 (9th Cir. 1958); Trice v. United States, supra, and his reputation in the community as a narcotics seller. Clearly the Government did not initiate Luna's criminal state of mind, it merely activated the criminal transaction. See Saganski v. United States, 358 F.2d 195, 202 (1st Cir. 1966). That six weeks elapsed between the first time the sale of heroin was discussed and the time when the first actual transaction was completed should not militate for a finding of entrapment as a matter of law. See United States

v. Sosa, 379 F.2d 525 (7th Cir. 1967). Hardly any time had elapsed when Luna expressed more than sufficient interest, amounting virtually to a preliminary agreement, to put the buyer on further inquiry. This Court has found that a two and one-half months time lapse, which defendant contended was due to his resistance to alleged Government persuasions, could well have resulted from the time needed to find and exploit a source of supply, and thus presented a question for the jury. Young v. United States, 286 F.2d 13, 15 (9th Cir. 1960), cert. denied 366 U.S. 970 (1961).

B. EVIDENCE OF REPUTATION AND PRIOR ARRESTS WAS PROPERLY ADMITTED AND FORMED A SUFFICIENT BASIS FOR GOVERNMENT ACTION IN PROVIDING OPPORTUNITY FOR CRIME.

Once sufficient evidence is presented to create a jury question of entrapment, the Government may conduct a searching inquiry into defendant's past in order to show predisposition for this type of illegal behavior and the attendant reasonableness of the Government's activities. Sherman v. United States, supra, at 372; Sorrells v. United States, 287 U.S. 435 (1932). To that end, the Government in this case introduced evidence of twelve-year old arrests for narcotics violations and evidence of Luna's past and current reputation in the community for involvement in narcotics trade.

Evidence of predisposition and justification for Government activities has never been regarded as requiring the conclusiveness of a certainty that defendant is in fact an established narcotics dealer. The Government does not have to show even "probable cause" for belief that defendant is so engaged. See Trice v. United States, supra, at 519.

As stated by the First Circuit:

"Solicitation to commit a crime does not of itself involve constitutional rights, and is not comparable to the arrest of a person or to the invasion of premises. . .

"We hold that it is not per se offensive

conduct for the Government to initiate inducement without a showing of probable cause."

Whiting v. United States, 321 F.2d 72, 76-77 (1st Cir. 1963) cert. denied 375 U.S. 884 (1963).

The evidence of prior acts need not even show that defendant was ever arrested, and such evidence may constitute what otherwise would be inadmissible hearsay. Trice, supra, see also, Washington v. United States, 275 F.2d 687, 690 (5th Cir. 1960); Carlton v. United States, supra, at 798-99. If hearsay evidence of prior sales not leading to arrest is admissible, a fortiori, evidence of prior arrests for related offenses is admissible.

Luna complains that the arrests took place some twelve years prior to the sale. This Court has found identical or longer periods of time not to be too remote. Trice, supra; Carlton, supra.

Luna also complains that the narcotics agent (Maria) and informant (Ochoa) did not have a sufficiently authoritative foundation upon which to base their testimony of reputation in the community. Maria's knowledge stemmed from the record of prior arrests, supra, and conversations with habitués of the cafe where Luna constantly spent his spare time. Ochoa was a member of the same community and had known Luna and his associates for more than a decade. The secretive nature of the narcotics trade and the

exigencies of efficient use of time for police detection may have precluded any great concreteness to the narcotics agent's information. Yet cross-examination was available to be utilized to attempt to persuade the jury not to attach great weight to Maria's testimony. Ochoa's testimony as to reputation, built on a very solid foundation, was likewise subject to cross-examination in order to test its weight. See United States v. Cooper, 321 F.2d 456 (6th Cir. 1963). See also Proffit v. United States, 316 F.2d 705 (9th Cir. 1963). And, in an unrelated context where the use of reputation evidence has traditionally been subject to great judicial wariness, it was said:

"Both propriety and abuse of hearsay reputation testimony, on both sides, depends on numerous and subtle considerations difficult to detect or appraise from a cold record, and rarely and only on a clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject. "

Michelson v. United States, 335 U.S. 469, 480 (1948).

Luna concludes that the Government's actions in providing him an opportunity for crime cannot find justification, as a matter of law, by virtue of his reputation for involvement in the narcotics trade. The Government notes that, besides Luna's reputation, the narcotics agents relied on a number of prior narcotics arrests,

albeit aged. Even if this were not so, to require the Government to act only upon incontrovertible evidence of specific proven criminality "would, in effect, give the narcotics peddler 'one free shot' before he could be convicted for his crimes."

Young v. United States, supra, at 15. Despite Luna's contrary affirmations, no requirement of "good cause . . . reasonable belief . . . [action restricted to the] close independent supervision [of] . . . a neutral and detached magistrate" [Appellant's Brief at 31-32], have been imposed in entrapment cases. Nor should they; rather than situations where Government action directly deprives a person of his liberty (e.g. warrants) or situations where the availability of alternative methods suffice to outbalance the threat of infringements on privacy, (e.g., restricting police methods of search and interrogation), police stratagem of this type does not infringe upon rights, and the undercover "victimless" narcotics trade often can only be detected upon relatively scant evidence of wrongdoing. This does not mean that law enforcement officers should be allowed free rein in offering inducement. Rather, practicality and the low probability of invasion of rights necessitates that narcotics agents investigate all trustworthy scents of illicit activities.

C. NEITHER EXISTING CASE LAW NOR THE POLICIES UNDERLYING THE FUNCTION OF THE JURY SUPPORT THE CONTENTION THAT THE JUDGE SHOULD DETERMINE WHETHER THE GOVERNMENT HAD CAUSE TO PROVIDE OPPORTUNITY TO THE ACCUSED TO COMMIT THE CRIME CHARGED IN THE INDICTMENT.

Once a defendant raises the entrapment defense and alleges that government agents induced him to violate the law, the government may cast light on their use of detection by encouragement by showing an "existing course of similar criminal conduct" by defendant or his "already formed design to commit the crime or similar crimes." See United States v. Becker, 62 F.2d 1007 (2d Cir. 1933) (L. Hand, J.). The government thereby justifies their actions as prompted by defendant's predisposition to commit a particular type of crime. In proving predisposition, great latitude is accorded the government in bringing to light relevant features of defendant's past conduct. If the result of such inquiry shows scant evidence of previous wrongdoing, not only is predisposition made unlikely, but the defendant gains in psychological effect by evoking the ugly spectre of the agent provocateur to be contrasted with the lack of shortcomings on defendant's part. Yet, as is often the case, if inquiry into defendant's predisposition uncovers a great deal of past wrongdoing and discloses his reputation as, e.g., a narcotics seller, a risk is created that the jury may allow this evidence to weigh in its determination of

guilt of the offense charged. Because of this possibility, Luna would have this court rule that the question of whether he was predisposed to commit the offense and the government justified in providing him with opportunities to do so are inquiries which are psychologically too demanding of a jury. Thus, Luna avers, they are to be dissected from the case and excoriated from the sight of the jury, fit only for the cold impartiality of judges.

The Supreme Court of the United States has ruled directly contrary to Luna's contention. Sorrells v. United States, 287 U.S. 435, 445-49 (1932). Faced with the affirmation that the entrapment issue must be decided separately before the judge, the Sorrells court reasoned that such a process, rather than leave entrapment as a defense, would relegate it to the status of a judicial dispensation from prosecution, thereby offending the Congressional intent manifested in the statute.

Sorrells' vintage should not connote probability that the court might well reach a contrary result today. In the landmark Sherman decision, although severance of entrapment issues was not directly presented, the Court commented on the subject:

"Not only was this rejected by the Court in Sorrells but where the issue has been presented to them, the Courts of Appeals have since Sorrells unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function

of determining the guilt or innocence of the accused.

"To dispose of this case on the ground suggested would entail both overruling a leading decision of this court and brushing aside the possibility that we would be creating more problems than we would supposedly be solving."

Sherman v. United States, 356 U.S. 369,
377-78 (1958). See also Osborn v.
United States, 385 U.S. 323. 322 N.
11 (1966).

As noted in Sherman, the Courts of Appeals have been virtually unanimous in deciding against shielding entrapment issues from the view of juries. See e.g., Erwing v. United States, 394 F.2d 829, 830 (9th Cir. 1968); United States v. White, 390 F.2d 405, 406 (6th Cir. 1968); United States v. Dehar, 388 F.2d 430, 433-34 (2d Cir. 1968); United States v. Johnson, 371 F.2d 800, 803 (3rd Cir. 1967); Carson v. United States, 310 F.2d 558, 559, 560-61 (9th Cir. 1962); Walker v. United States, 298 F.2d 217, 225 (9th Cir. 1962); Young v. United States, 286 F.2d 13, 15 (9th Cir. 1960); Demos v. United States, 205 F.2d 596, 599 (5th Cir. 1953). It is submitted that Judge Friendly, speaking for the Second Circuit aptly portrayed the state of the law on this point:

"So long as Sorrells stands, our problem is not whether entrapment should ever be submitted

to the jury, but when the evidence calls for doing so . . . [i. e. when entrapment is not shown as a matter of law]. . . "

United States v. Riley, 363 F. 2d 955,
957 (2d Cir. 1966).

Recently, this Court stated that,

"Appellant . . . contend[s] . . . that the nature of the entrapment defense is such that it can never be adequately and fairly dealt with by a jury.

Cf. , Jackson v. Denno . . . In view of Sherman . . . and Sorrells . . . such a change in the law must be left to others. "

Erwing v. United States, 394 F. 2d

829, 830 (9th Cir. 1968). See also

Carlton v. United States, supra, at 797-98.

Yet Luna, despite the Erwing decision, looks to Jackson v. Denno, 378 U. S. 368 (1964), as support for his affirmations. In that case it was found inherently rife with potential prejudice for the same jury to rule on voluntariness (and thus, admissibility) of a confession and on the guilt or innocence of the defendant. In balancing the sanctity of the jury's domain with the vast potentialities for prejudice, it was ruled that the judge should decide on voluntariness out of the presence of the jury. In entrapment cases no such balance is struck. Distinct, often conflicting factual issues

are here presented for resolution. To sever the questions of predisposition and justification from inducement is to obscure their essential interdependence. To allow the defense to show the government agents' actions in vacuo, without allowing the jury to take into account the relevant factors of predisposition which justify the government's acts, is to create an unreal factual setting for the jury to rule on. This should be seen in light of the fact that the government must prove a negative--non-entrapment--beyond a reasonable doubt. The practice struck down in Jackson v. Denno required the jury to know that defendant has admitted the crime charged and then to strike this from their mind and consider his present refusal to admit the crime. Severing the voluntariness issue from the jury's earshot still allowed the jury to pass on all the relevant factual issues of the case. No such prejudicial enormity nor potentialities for logical surgery exist in entrapment cases.

The law forecloses the whole line of inquiry which Luna contends prejudices his case unless defendant thinks the net advantage from opening it up would be with him. As the view of the prevailing law has it:

"[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and disposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by

reason of the nature of the defense."

Sorrells v. United States, supra, 287 U.S.
at 451-52. Cf. Michelson v. United
States, 335 U.S. 469, 485 (1948).

And, as expressed by the First Circuit:

"If an accused asserts that he is a
lamb who has been led astray he must be
prepared to face evidence that he is a wolf
on the prowl."

Gorin v. United States, 313 F.2d 641,
653 (1st Cir. 1963).

By relying on Jackson v. Denno, defendant likens the situation where the Government attempts, as part of its case in chief, to introduce questionable and highly prejudicial statements, to the situation where defendant has chosen to defend on grounds of his own innate non-criminality and the Government responds, as it must, by proving the contrary. An easy and fair dissection of evidence admissibility is thus erroneously analogized to the cumbersome and irrational bifurcation of essential issues prompted by the defense.

Defendant's underlying view on the legal mechanics of entrapment intimates that rather than a defense, the entrapment doctrine provides for judicial dispensation, precluding application of penal statutes. Sorrells is to the contrary and the

Supreme Court has expressed disinclination to overturn that decision. Or, defendant is averring that entrapment is a defense, but is "too hot" for the jury to handle. Such lack of faith in juries belies the historical *raison d'etre* of that institution. It goes beyond Jackson v. Denno to a contention that juries are simply untrustworthy except where chances of prejudice are virtually non-existent. Its logical conclusion is that in all criminal prosecutions where defendants put their character in issue or simply take the stand and are to be impeached by prior convictions, the jury cannot hear the relevant impeachment due to potential prejudice. Such is not the law.

D. THE COURT'S INSTRUCTIONS TO
THE JURY VIEWED IN THEIR
TOTALITY DID NOT CONSTITUTE
PLAIN ERROR.

1. The Jury Was Not Misled Into
Believing Any Affirmative Find-
ing Was Requisite To Acquittal.
-

Luna's counsel did not in any way object to the entrapment instruction [R. T. 844]. Thus, he is precluded from relitigating the issue on appeal unless "plain error" is shown. Federal Rules of Criminal Procedure, 52(b).

After instructing that entrapment would not lie if the jury found predisposition of the defendant and that the Government merely offered opportunity, the jury was instructed that it must acquit defendant if it "should find" what was then explained (and had been previously explained) to be entrapment [R. T. 839]. Although this Court has ruled to the contrary, Nordeste v. United States, 383 F.2d 335, 339-40 (9th Cir. 1968), Luna avers that such phrasing led to plain error because it allegedly connoted that the jury had to make an affirmative finding of entrapment or convict the defendant. The above excerpt from the instructions, however, must be seen in the context of the instructions as a whole. Notaro v. United States, 363 F.2d 169, 176 (9th Cir. 1966). Preceding the above-quoted words, the instruction read:

"The defendants are entitled to the
presumption of innocence. This presumption

attends them throughout the trial, and the burden of overcoming this presumption rests upon the Government which must establish the defendant's guilt by evidence beyond a reasonable doubt . . . "

[Then follows a lengthy definition of reasonable doubt.]

"You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you." [R. T. 834-A], (emphasis added).

After the portion of the instructions here complained of was given, Judge Tolin warned the jury not be swayed by any hysteria over narcotics problems and reminded the jury of the serious consequences of conviction, concluding with the cautionary statement, "[T]herefore, you want to be very careful, giving them the benefit of any reasonable doubt and remember also if no reasonable doubt remains that the government is entitled to a verdict of guilty." [R. T. 843].

It is submitted that the above instructions forcefully brought home to the jury, before and after the entrapment instruction, that all elements of the government's case must be proven beyond a reasonable doubt. Since entrapment was effectively the only issue in Luna's case, and the jury knew that the reasonable doubt standard applies to all issues, the jury could hardly avoid the conclusion that the government had the burden to prove non-entrapment beyond a reasonable doubt. Nordeste v. United States, supra (identical instruction and contention; no plain error). Moreover, entrapment was fully explained to the jury during trial, provoking defense counsel's reaction, "Very good job, your honor." [R. T. 767].

This Court and the Supreme Court of the United States have consistently asserted that plain error will not be found where defendant did not object and instructions similar to the one attacked by Luna, taken as a whole, did not undermine substantial rights. Lopez v. United States, 373 U. S. 427, 436 (1963); Nordeste v. United States, supra; Smith v. United States, 390 F.2d 401, 402-03 (9th Cir. 1968); Young v. United States, 286 F.2d 13, 16 (9th Cir. 1960). See also Cohen v. United States, 366 F.2d 363, 368 (9th Cir. 1966), cert. denied, 384 U. S. 1035 (1967). And similar allegations against virtually identical instructions have also been refuted in the various circuits. Cross v. United States, 347 F.2d 327 (8th Cir. 1965); Martinez v. United States, 300 F.2d 9 (10th Cir. 1962); Chapman v. United States, 271 F.2d 593 (5th Cir. 1959). See also Harrington v.

United States, 391 F.2d 605 (5th Cir. 1968); Demos v. United States, 205 F.2d 596 (5th Cir. 1953) cert. denied, 346 U.S. 873 (1953).

2. No Plain Error Resulted From
The Wording Used In The In-
struction.

Since the Court at one point used the phrase "Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of entrapment", Luna contends plain error arose in that the jury would think that prior lawbreakers, having once had the intent to violate the law, could not defend on grounds of entrapment. The lengthy entrapment instructions, repeated and re-explained by the judge, are thus asserted to be faulty because of the interjection of this phrase. Surely if the jury thought entrapment was not an available defense they must have thought it odd that the judge continuously explained the defense to them, especially in light of the fact that entrapment was obviously the primary issue in Luna's prosecution. In reality, the entrapment issue was presented as a question of whether the commission of this crime "originated in the mind of the law-enforcement agency" and was not "born in the mind of the defendant" rather than an instruction that previous criminality precluded entrapment [R. T. 767]. Again, the government notes defense counsel's agreement with the instructions and notes

that the previously cited case law of "plain error" in no way comports with defendant's contentions.

The above considerations also apply to Luna's contention that the instruction's reference to entrapment by "government agents" connoted that the informant could not be the entrapping force. Despite this contention, it is well to note that the Court did in fact refer, in its instructions, to entrapment issues raised by an offer "either directly or through an informer or other decoy to purchase narcotics from an unsuspecting person." [R. T. 839].

Moreover, the informant while on the stand, known by the jury to be an informant, was presented as a government "agent" [R. T. 698]. And, in closing argument, defense counsel stated that "Mr. Ochoa [the informant] was a government agent or at least Mr. Maria says so;" [R. T. 805], and stated the defense that "the idea [to sell] was put in [Luna's] mind by Mr. Ochoa and further by Mr. Maria [the narcotics agent]." [R. T. 805]. Defense counsel made quite clear that it was the informant's inducement which was the focal point of the alleged entrapment [R. T. 805-06].

This court has ruled adversely to defendant on an identical claim that failure to directly specify that informants are government agents capable of inducement constitutes plain error. Nordeste v. United States, 393 F.2d 335, 338-39 (9th Cir. 1968).

3. No Error Resulted From the Judge's Instructions On The Presumptions Stemming From Possession.

Luna took the stand and admitted selling heroin to the agent.

The defense in no way even hinted denial of these sales. Consequently, not the faintest objection was heard when the trial judge instructed the jury that possession of heroin gives rise to an inference that it was imported contrary to law with the possessor's knowledge, and thus he must justify his possession or risk conviction [R. T. 832-33]. Luna contends that plain error stems from the trial judge's failure to clearly and specifically convey to the jury that if Luna did not explain and justify possession, this would not by itself support a conviction for the sale of the drug, conceding its relevance to other counts.

The nine-count indictment contained four counts alleging the "sale" of heroin. The evidence at trial conclusively and uncontrovertedly showed specific sales in accordance with the indictment. In his instructions to the jury, preceding the instructions dealing with presumptions, Judge Tolin read each count of the indictment to the jury. Each count specified the gravamen of the illegal behavior, each sales count delineated all relevant acts constituting each specific sale which the jury must find to convict. When the presumption instruction was announced the jury must have understood that its relevance to the sales count was not such that a "sale", in its common meaning, need not be found. It is

hard to believe that there exists any rational probability that the jury would think that "sale" does not mean "sale", that a conviction for sale of narcotics could rest on possession alone.

The instruction as to presumptions must be viewed as a whole. Immediately following the statement that non-explanation of possession is sufficient for conviction, the Judge explained the limit to this concept:

"Despite the fact that the indictment contains the allegations that the heroin involved had been imported into the United States contrary to law, and that the defendant knew such to be the fact, nevertheless, the statute makes it unnecessary for the Government to offer any evidence in support of the charge as to these elements if the Government shows that the defendant was in constructive or actual possession of the substance. Actual or constructive possession of the substance gives rise to an inference that it was imported contrary to law and to the further inference that the person in possession had knowledge of such unlawful importation. It is then incumbent upon the defendant to go forward with the evidence and show that he came into possession of the substance legally. In this connection, I charge you that if you find defendant had in his possession the forbidden substance, such possession, actual

or constructive, alone would be sufficient proof of the elements of importation and knowledge thereof, unless such possession is explained to your satisfaction.

"A defendant on trial may overcome inferences arising against him from actual or constructive possession by facts and circumstances and by satisfactory proof that in his case possession did not involve a violation of the statute, either because the substance was not imported contrary to law or because he had no knowledge of unlawful importation. "

[R. T. 832-33] (emphasis added).

Of the nine counts upon which Luna was convicted, he received twenty-year concurrent sentences on all sales counts, a twenty year concurrent sentence on the conspiracy count and on all possession counts but one he received twenty-year sentences to run concurrently. On one possession count he received a five-year sentence to run consecutively. Where sufficient evidence exists to convict on any of several concurrent counts, reversal will not result from error on another count upon which a concurrent sentence was imposed. That such harmless error does not require reversal is a well-established rule in this circuit.

Russell v. United States, 288 F. 2d 520, 521-22 (9th Cir. 1961).

Thus even if conviction on the sales counts was in any way tainted, the "plain error" prerequisite has not been met.

IV

CONCLUSION

For the reasons stated in the argument, the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SALVADOR H. PULIDO,

Appellant,

vs.

UNITED STATES OF AMERICA ,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, SALVADOR H. PULIDO (hereinafter referred to as PULIDO), was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on March 16, 1960. [C. T. 2] ^{1/} The Indictment contained Nine Counts covering four transfer transactions of heroin and one conspiracy count. The defendant PULIDO was charged in Count Seven of the Indictment with selling approximately 64 grams of heroin to an agent of the Federal Bureau of Narcotics, in Count Eight he was

1/ Refers to Clerk's Transcript.

charged with receiving, concealing and facilitating the concealment and transportation of this same heroin, and Count Nine alleged a conspiracy for the sale of heroin that involved codefendants Manuel Luna (hereinafter referred to as Luna), Frank Contraras Collins (hereinafter referred to as Collins), PULIDO, and one Gilbert C. Vasquez (hereinafter referred to as Vasquez). [C. T. 8-11] Each of the above named defendants were also charged in the substantive counts for the heroin transaction of February 23, 1960 [C. T. 8-11].

On March 21, 1960, PULIDO was arraigned before the Honorable Thurman Clarke, United States District Judge, and at this time was represented by Elinor Katz, a retained counsel [C. T. 12]. On March 28, 1960, PULIDO, in the presence of Attorney Elinor Katz, entered a plea of not guilty to all counts of the indictment in which he was charged [C. T. 13]. On April 11, 1960, the case was assigned to the Honorable Ernest A. Tolin, United States District Judge, for trial [C. T. 14]. On April 18, 1960, Attorney Katz advised the court that a conflict of interest existed as to the defendant Collins. She was relieved of the responsibility of representing Collins, but did remain as an attorney for the remaining three defendants, PULIDO, Luna and Vasquez [C. T. 15].

On June 7, 1960, Collins, PULIDO, Luna and Vasquez appeared for jury trial before the Honorable Ernest A. Tolin [C. T. 23]. On this date the jury was selected and the trial commenced. In the afternoon of June 7, 1960, out of the presence

of the jury, the defendant Collins through his counsel, John K. Duncan, entered a motion to change his plea and a plea of guilty was accepted to Count Two of the Indictment [C. T. 23]. The jury trial continued as to the remaining three defendants, PULIDO, Luna and Vasquez [C. T. 31]. On June 16, 1960, the jury returned a verdict finding all defendants guilty of all counts as charged, thereby convicting PULIDO of the crimes alleged in Count Seven, Eight and Nine of the Indictment [C. T. 33].

On June 30, 1960, PULIDO was sentenced to the custody of the Attorney General for a period of 20 years on each of Counts Seven, Eight and Nine, said sentences to run concurrently with each other [C. T. 36].

No notice of appeal was filed in this case. However, pursuant to PULIDO'S motion under Title 28 U.S.C. §2255, leave to appeal the conviction was granted.

The jurisdiction of the District Court was based upon Section 174 of Title 21, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERRORS

- A. DOES THE PRESENCE OF HEARSAY TESTIMONY IN THE TRIAL RECORD CONSTITUTE REVERSIBLE ERROR WHEN NO OBJECTION WAS MADE TO THE TESTIMONY DURING TRIAL?
-
- B. WAS THE ARREST AND SEARCH OF PULIDO BASED UPON ADEQUATE PROBABLE CAUSE?
-

III

STATEMENT OF FACTS

The Indictment charged Nine Counts of violations of Title 21, United States Code, Section 174. Counts One through Six alleged that on the dates of January 18, 1960, January 27, 1960, and February 2, 1960, the defendants Luna and Collins sold heroin to an agent of the Federal Bureau of Narcotics [C. T. 2-8]. Counts Seven and Eight of the Indictment alleged that on February 23, 1960, defendants Luna, Collins, Vasquez and PULIDO did possess, conceal and transfer approximately 64 grams of heroin to an agent of the Federal Bureau of Narcotics [C. T. 8-9]. Count Nine of the Indictment alleged a conspiracy to sell approximately 64 grams of heroin and charged that the co-conspirators consisted of defendants Luna, Collins, Vasquez and PULIDO. At the trial of this case, defendant Collins entered a plea of guilty to Count Two of the Indictment [C. T. 23], and the remaining defendants were each convicted on all counts in which they were charged [C. T. 31-33].

Due to the fact that defendant PULIDO was only charged and

convicted for the transaction occurring on February 23, 1960, which included two substantive counts and one conspiracy count alleging dates of the conspiracy from February 21, 1960, to and including February 23, 1960, this statement of facts will be addressed only to the evidence concerning this transaction.

Primarily, the Government's evidence turned on the testimony of Agent Maria of the Federal Bureau of Narcotics, who testified concerning negotiations and the actual transfer of approximately 64 grams of heroin from defendant Luna to himself [R. T. 154-^{2/}57]. The transaction occurred near the Carioca Cafe in Los Angeles [R. T. 157]. On the evening of February 23, 1960, Agent Maria, with accompanying surveillance agents, met the co-defendant Manuel Luna in front of the Carioca Cafe in Los Angeles [R. T. 156]. At this meeting Luna received a package from Collins and in turn gave it to Agent Maria [R. T. 156]. Agent Maria gave Luna approximately \$720.00 of Government Monies, having recorded the serial numbers of the bills used to pay for the 64 grams of heroin. These bills were covered with a fluorescent substance that caused a glowing under proper lighting [R. T. 157]. Immediately thereafter Luna was observed proceeding with the codefendant Collins to the Rio Grande Bar located a few doors from the Carioca Cafe [R. T. 262]. As soon as Collins and Luna had entered the bar, they were met by agents from the Federal Bureau of Narcotics, escorted outside of the bar and

2/ Refers to Reporter's Transcript.

placed under arrest [R. T. 262]. As soon as Luna and Collins were arrested they were taken to a nearby parking lot and searched. It was at this time that the agents discovered that approximately \$650.00 of the money was not in Luna or Collins' possession [R. T. 263].

During the time that Luna and Collins were in the bar, Agent Olexa and Stark observed two individuals sitting near the door, watching the arrest of Luna and Collins with apparent intense interest [R. T. 270-71, 383, 385, 397-98]. After the arrest and search of Collins and Luna the agents returned to the bar and discovered that the two individuals who had been sitting by the door were no longer present. Upon placing Luna and Collins in the agent's car, they traveled the general area near the Rio Grande Bar and observed PULIDO and Vasquez walking in a rapid manner. At this time Collins identified these two individuals as being the men who had received the money [R. T. 425]. Based upon the statement of Collins that he had received the heroin from these two individuals, and their observations, the agents placed PULIDO and Vasquez under arrest [R. T. 274-75, 282, 365, 425]. A brief search disclosed the \$640 of prerecorded serial numbered monies that had been paid for the narcotics in the possession of PULIDO [R. T. 427].

After placing PULIDO and Vasquez under arrest, they were both interrogated concerning the \$640.00 found in the possession of PULIDO. PULIDO told the agents that he had earned this money while working in Tijuana [R. T. 432]. The evidence in this case

established that this was the identical money that had been paid approximately one-half hour earlier to Luna for the 64 grams of heroin [R. T. 571-72, 426-27].

During the trial of this matter Agents Maria and Olexa did testify as to the post-arrest statements of Collins, alleging that PULIDO was one of the individuals involved in this transaction [R. T. 166-68, 282]. After some testimony by Agents Maria and Olexa, Judge Tolin called counsel and defendants to the bench for a discussion out of the hearing of the jury [R. T. 282]. Judge Tolin informed the prosecutor that the post-arrest statements of Collins were hearsay and that he would not allow further inquiry into Collins' statements that implicated PULIDO [R. T. 283]. Prior to Judge Tolin making this ruling, no objection had been raised by defense counsel to the testimony [R. T. 283]. However, at this time defense counsel moved to strike the hearsay testimony of Agent Olexa that had already been admitted [R. T. 284-86]. The Judge refused to grant the motion without some specificity as to exactly what portions of the testimony were to be stricken, i. e. , the Judge refused to grant an omnibus motion to strike [R. T. 284-86]. The defense counsel was requested by the court to obtain a transcript and thereby it could be determined what testimony was improper [R. T. 286-87]. The record is void of any indication that the defense counsel did again renew this motion or seek to have any of this testimony stricken.

Subsequent to Judge Tolin's ruling the Assistant United States Attorney attempted to elicit testimony concerning Collins'

post-arrest statements implicating PULIDO. However, the prosecutor's attempt was objected to and no damaging testimony was obtained concerning this matter [R. T. 365]. While making one objection defense counsel Katz specifically declared that if the Assistant United States Attorney continued to attempt to obtain this hearsay testimony a mistrial would be requested [R. T. 422-23]. The record does not reflect any additional attempts to obtain hearsay evidence after this objection by PULIDO'S attorney.

During the trial the former defendant Collins testified and contradicted the testimony of Agents Maria and Olexa by denying that PULIDO had any connection with the narcotics whatsoever [R. T. 518, 523, 525]. The remaining testimony of Collins did coincide with the agents' testimony, by implicating Luna and Vasquez in the transaction [R. T. 503, 510, 516, 547-49].

On June 16, 1960, the jury returned a verdict of guilty to all counts as to all defendants [C. T. 31, 33]. On June 30, 1960, the defendant PULIDO was sentenced to the custody of the Attorney General for a period of 20 years on each count, said counts to run concurrently [C. T. 34].

IV

ARGUMENT

A. THE EXISTENCE OF HEARSAY TESTIMONY IN THE TRIAL DOES NOT CONSTITUTE REVERSIBLE ERROR.

1. THE FAILURE TO OBJECT TO HEARSAY TESTIMONY PRECLUDES AN APPELLANT FROM RAISING THE ISSUE OF THE ADMISSIBILITY OF THAT EVIDENCE ON APPEAL.

The appellant's contention is that Agents Maria and Olexa of the Federal Bureau of Narcotics testified at trial that Collins had told them that PULIDO was one of the men from whom he had obtained the heroin [R. T. 166-68, 274]. Since these statements were made after Collins had been arrested - after the conspiracy had terminated - therefore they would be objectionable as hearsay. However, at no time during the testimony of Maria and Olexa did counsel for PULIDO raise an objection or seek to have the hearsay testimony stricken [R. T. 166-69, 273 - 74]. A review of the transcript reveals that it was Judge Tolin who made the determination that the testimony of Agents Maria and Olexa contained hearsay and that he would not admit any more testimony of that type [R. T. 283]. It was only at this time -- after Agent Olexa had testified -- that counsel for PULIDO attempted to have the hearsay stricken from the record [R. T. 284-86]. Judge Tolin denied the motion to have it stricken on the grounds that there was not sufficient specificity as to what was to be stricken [R. T. 284-86].

The trial judge also instructed counsel for PULIDO to have a transcript of the testimony prepared so that it could be determined exactly what should be stricken, because the agent's testimony did contain a substantial amount of admissible evidence [R. T. 286-87].

It is a well-established principle that when a person fails to make a seasonable objection to testimony at trial he is deemed to have waived his right to raise that question on appeal. As stated in Oleander v. United States, 237 F.2d 859 (9 Cir. 1956), at 866:

"The objection on grounds of hearsay, not having been made before the trial court, cannot be urged here [on appeal] as reversible error."

The reason requiring defendant to object to inadmissible evidence in a trial is the necessity of conducting an orderly trial. It is incumbent upon a defendant to object to evidence so that the court can have the opportunity to rule on the matter at the time the evidence is offered. See Feyrer v. United States, 314 F.2d 110, 112 (9 Cir. 1963), where the defendant contended that certain statements made by an alleged co-conspirator implicating him in the crime were erroneously admitted because the conspiracy had terminated prior to the making of those statements. The Feyrer court held that since the defendant did not object to those statements at the proper time, it was unnecessary for the court to consider whether or not the extra-judicial statements were made subsequent

to the termination of the conspiracy. The same rationale is found in Sekinoff v. United States, 283 Fed. 38, 39 (9 Cir. 1922), where the Ninth Circuit again reiterated that failure to make an objection at trial precludes consideration of this issue on appeal.

Appellant contends that the prosecutor continued to seek testimony concerning Collins' post-arrest statements implicating PULIDO in the crime. [Brief for Appellant at p. 11]. However, the record does show that PULIDO'S counsel did object to this testimony concerning Collins' post-arrest admissions [R. T. 365, 422-24]. The objections of PULIDO'S counsel were ruled upon, and PULIDO'S name was not mentioned [R. T. 365, 424-25]. No further testimony concerning Collins' post-arrest statements was sought after counsel for PULIDO stated that if this type of evidence was to continue to be solicited a mistrial would be requested [R. T. 422-23].

After Judge Tolin had called counsel and the defendants to the bench and instructed the prosecutor that he would no longer tolerate any attempt to elicit Collins' post-arrest statements implicating PULIDO, counsel for PULIDO made a motion to strike the testimony of Agents Maria and Olexa [R. T. 284-86]. However, after some discussion, Judge Tolin denied the motion to strike the testimony stating that he would not grant an omnibus motion and he would require specificity as to which portions were considered objectionable, because the testimony did contain legitimate evidence [R. T. 284-86]. The record fails to show that counsel for PULIDO provided the Judge with a transcript delineating the

objectionable portions of the testimony. As stated in Metcalf v. United States, 195 F.2d 213 (6 Cir. 1952), at 216:

"It is well settled that objections to evidence should be timely made when the evidence is offered, and that it is within the discretion of the trial judge to sustain or overrule a motion delayed until the close of the Government's case to strike from the consideration of the jury evidence previously received without objection "

The courts do repeatedly hold that counsel cannot be permitted to sit idly by and permit a witness to testify with the vague hope that the testimony may help his client and then finding no benefit seek to strike it out of the record. See Marx v. United States, 86 F.2d 245 (8 Cir. 1936), at 251. It is respectfully submitted that the handling of the hearsay testimony by counsel for PULIDO does fall within the above mentioned rule.

2. THE EXISTENCE OF HEARSAY
TESTIMONY IN THE TRIAL DOES
NOT CONSTITUTE PLAIN ERROR
AND UNDER THE FACTS OF THIS
CASE SHOULD BE CONSIDERED
HARMLESS ERROR.

The primary thrust of defendant PULIDO'S argument is that the plaintiff continued to press to obtain hearsay evidence implicating PULIDO. The record shows that on several occasions the prosecutor did ask witnesses what Collins said after his arrest [R. T. 284-86, 365]. However, after Judge Tolin, on his own motion, decided that the testimony was inadmissible, counsel for PULIDO commenced to object to the hearsay testimony [R. T. 284-86]. In one situation a partial answer was made wherein Collins identified the two men walking on the street as the two men about whom he had previously spoken [R. T. 365]. However, the name of PULIDO was not used by this witness, nor was the nature of the conversation introduced [R. T. 365]. Furthermore, when the court did sustain objections to this testimony it specifically stated in front of the jury that what Collins said after he was arrested could be used against Collins; but because Collins was no longer on trial, his statements could not be used against anyone else [R. T. 423-424]. These verbal qualifications by the trial judge certainly put the jury on notice that the post-arrest statements of Collins could not be used to incriminate or convict PULIDO.

When Collins was called to the stand by the Government he testified in conformity with the testimony of Agents Maria and Olexa, with the exception of PULIDO'S role in the February 23rd

transaction [R. T. 497]. At the trial he denied that PULIDO had any involvement whatsoever with the narcotics. Now this testimony by Collins was clearly contrary to the statement originally made to Agents Maria and Olexa, wherein PULIDO was identified as one of the individuals who was the source of the heroin. [R. T. 166-68, 274, 282]. Naturally, one may impeach his own witness by the use of a prior contradictory statement when he has been surprised. See Slade v. United States, 267 F.2d 834 (5 Cir. 1959). The element of surprise primarily consists of a showing that the testimony of the witness deviated from what was a reasonable expectation of the party calling him. See United States v. Kahaner, 317 F.2d 459 (2 Cir. 1962), cert. den. 375 U.S. 836 (1963). No showing of surprise was made in this case for the simple reason that the prior inconsistent statement was already before the jury through the testimony of Agents Maria and Olexa, and no objection had been lodged to that testimony [R. T. 166-68, 274-282]. There is no way to know or to speculate whether the prosecutor was in fact surprised except to note the major deviation in the testimony that Collins gave from the statements previously given to the agents of the Federal Bureau of Narcotics. Had the showing of surprise been made, then the prior inconsistent statement implicating PULIDO would have been before the jury. While not admissible per se as evidence in the case, it would certainly have been a statement for impeachment and could have been considered in that context by the jury. Because these facts could have been before the jury for impeachment it is respectfully submitted that there is

no prejudicial error in the case by their earlier admission into evidence.

It is pertinent to the consideration of harmless error that the evidence against PULIDO is substantial, irrespective of any hearsay testimony. The evidence against PULIDO was that he had in his possession \$640.00 of the money used to purchase the narcotics [R. T. 472]. In explaining his possession of this money PULIDO gave a patently fabricated exculpatory statement claiming that he had earned the money while working in Tijuana, when in fact that money had been paid approximately one-half hour earlier for the acquisition of the heroin [R. T. 171-172, 433-34]. PULIDO'S intense interest in the arrest of Luna and Collins and his rapid walking were also indicative of his guilt. It is respectfully submitted that the existence of hearsay testimony in the trial -- when compared to the remaining evidence against PULIDO -- clearly demonstrates the absence of any error that would warrant a reversal of this conviction.

B. THE ADMISSION OF MONEY TAKEN FROM A DEFENDANT'S PERSON AND THE ADMISSION OF AN EXCULPATORY STATEMENT AS TO THE SOURCE OF THE MONEY INTO EVIDENCE DOES NOT CONSTITUTE REVERSIBLE ERROR WHEN THERE HAS BEEN NO MOTION TO SUPPRESS AND WHEN THE ARREST WAS BASED UPON PROBABLE CAUSE.

Counsel for PULIDO alleges that it was error to admit the money and the exculpatory statement of PULIDO because there did not exist any probable cause to arrest PULIDO. The money was obtained by a search of PULIDO'S person incidental to the arrest [R. T. 427]. Concerning the failure of a defendant to seek a motion to suppress, the court in Gilbert v. United States, 307 F.2d 322 (9 Cir. 1962), stated:

"Failure to make objections to evidence either before or at trial precludes consideration of objections thereto on appeal unless good cause for such failure is show." (Id at 325).

There is no showing whatsoever as to why a motion to suppress was not filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, by the defendant at the trial of the instant case. Of course, one obvious reason is that there did exist sufficient probable cause to arrest PULIDO. However, the Appellate Court pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure, may for the first time on appeal notice certain errors when the failure to recognize them would result in a miscarriage of justice and seriously affect the fairness, integrity or public

reputation of the judicial proceedings. See Billeci v. United States, 290 F.2d 628, 629 (9 Cir. 1961); Smith v. United States, 173 F.2d 181, 184 (9 Cir. 1949).

In the present case there exists a factual situation where an accomplice, Collins, informs the agents that he no longer has the money received from the transaction and has given it to his connection who he identifies as being PULIDO and Vasquez [R.T. 274, 282]. PULIDO and Vasquez had been observed in the Rio Grande Bar by Agents Stark, Olexa and Gjertsen [R.T. 383, 385, 270-71, 455-57]. They were subsequently observed walking in a rapid manner on the street shortly after the arrest of Collins [R.T. 425, 362]. At this time PULIDO and Vasquez were arrested by the agents of the Federal Bureau of Narcotics and the search was incident to this arrest. It is well-established in the Federal Courts that the uncorroborated testimony of an accomplice is sufficient to convict. See Williams v. United States, 308 F.2d 664 (9 Cir. 1962); Audet v. United States, 265 F.2d 837 (9 Cir. 1959), cert. den. 361 U.S. 815 (1960). If the uncorroborated testimony of an accomplice would be sufficient to convict, it would certainly appear to provide a sufficient basis for probable cause to arrest one of the individuals who is pointed out by an accomplice as having been involved in the crime. See Wooten v. United States, 380 F.2d 230, 232 (5 Cir. 1967).

Appellant argues vigorously that the factual situation and ruling in Castillon v. United States, 298 F.2d 256 (9 Cir. 1962), is controlling in the instant case. Appellant is mistaken in relying

upon the Castillon case to support any proposition attacking the legality of the arrest and search of PULIDO because of the significant factual differences. In Castillon, ibid., the informant was arrested and provided information about a different and distinct crime. In that case the informant, who had never previously given any information to the police, disclosed to them that he had previously sold narcotics to Castillon and described the place where Castillon resided. However, it was solely based upon this information that the police arrested Castillon, not having any independent knowledge that a crime had even been committed, or who had perpetrated it except for the statement of the informant. In the instant case, the agents knew by their own knowledge that a crime had been committed since Agent Maria had just purchased 2-1/2 ounces of heroin. Furthermore, they were aware that the narcotics had come from a source other than Collins or Luna because a substantial portion of the money paid for the narcotics was no longer in the possession of Luna or Collins [R. T. 263]. It was after obtaining this information that the accomplice, Collins, stated that PULIDO and Vasquez were his connection; that he had given one of them \$650.00, and that they were present at the scene of the crime [R. T. 274, 282].

The appellant's contention that his exculpatory statement - whereby he claimed he had earned the money in Tijuana - should have been excluded is premised upon the alleged illegality of PULIDO'S arrest. It is respectfully submitted that this contention is without merit for the identical reasons set forth in this brief concerning the search of PULIDO.

CONCLUSION

For the reasons stated in the argument the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRVING JACKSON,

Appellant,

vs.

LAWRENCE E. WILSON,
Warden, San Quentin Prison,
Tamal, California,

Appellee.

No. 22402

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS

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Appellee.

No. 22402

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred under Title 28, U.S.C. 1915. The jurisdiction of this Court is conferred by Title 28, U.S.C., section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California, denying his petition for writ of habeas corpus.

A. Proceedings in the State Courts:

On June 7, 1962, appellant was convicted of violating California Penal Code sections 209 (kidnapping for pur-

poses of robbery) and 211 (robbery) (two counts). He was sentenced to state prison for the term prescribed by law on all counts, such sentences to run concurrently. Appellant did not appeal (TR 41).

In his petition directed to the District Court appellant alleges that he filed petitions seeking habeas corpus relief in the Marin County Superior Court and the California Court of Appeal, First Appellate District. He alleges that these petitions were denied respectively on July 7, 1966 and August 4, 1966 (TR 5-6). On January 31, 1967, the California Supreme Court denied appellant's petition for writ of habeas corpus, holding that the writ did not lie to attack a final judgment on the grounds of illegal arrest and search (TR 35-40).

B. Proceedings in the Federal Courts:

Appellant's petition for writ of habeas corpus in the United States District Court for the Northern District of California was received on May 26, 1967 and filed on October 12, 1967 (TR 1). The District Court denied appellant's petition on October 12, 1967 (TR 50-53). Appellant filed motions for a certificate of probable cause and for leave to appeal in forma pauperis on November 1, 1967 (TR 54-62). These motions were granted on November 3, 1967 (TR 63). Notice of appeal was filed November 13, 1967 (TR 64-66).

APPELLANT'S CONTENTION

It was error for the District Court to deny appellant's petition for writ of habeas corpus without reviewing

the record of appellant's trial upon which appellant based his claim that his arrest and subsequent search violated his rights under the Fourth Amendment.

SUMMARY OF APPELLEE'S ARGUMENT

The District Court properly denied appellant's petition, correctly concluding that his arrest was based upon probable cause and therefore did not violate the Fourth Amendment.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S PETITION, CORRECTLY CONCLUDING THAT HIS ARREST WAS BASED UPON PROBABLE CAUSE AND THEREFORE DID NOT VIOLATE THE FOURTH AMENDMENT.

Appellant argues that the District Court's failure to consult the trial record renders the court's order erroneous. The District Court based its ruling on the facts contained in appellant's petition, and upon the opinion of the California Court of Appeal in People v. Wright, 216 Cal.App.2d 866, 31 Cal.Rptr. 432 (1963). Wright was appellant's co-defendant in the state trial proceedings. On appeal he alleged the same issue presently alleged by appellant, which the California Court of Appeal treated on the merits and decided adversely to Wright. Appellant stated in his petition to the District Court that he did not appeal because his co-defendant Wright had processed an appeal (TR 3).

The District Court's ruling was correct because the few facts stated in appellant's petition did not contradict

the findings of the California Court of Appeal in People v. Wright, supra. Therefore, in essence, appellant's petition argued a proposition of law - that the trial court (and also the Court of Appeal) erred in ruling that probable cause existed for his arrest.

The District Court did not merely accept the finding of the California appellate court. Rather, it reviewed the facts (as stated in appellant's petition and the Wright opinion) in light of federal cases treating the issue of probable cause for arrest. We submit that the Court correctly concluded that such probable cause existed.

The following statement of the facts bearing on appellant's claim of illegal arrest and search is taken from the California Court of Appeal's decision in People v. Wright, supra.

On November 16, 1961, three men entered a Los Angeles liquor store and, at gun point, robbed the owner and a customer. The victims evidently gave a description of the three bandits to the police, which included the observation that one of the men had a scar or cut on the left side of his face. 216 Cal.App.2d at 868, 31 Cal.Rptr. at 433.

"Immediately following defendants' departure, a report of the robbery was given to the police (Officer Salcido) by the victims. Later that same day Officer Salcido's report reached Officer Burke who was directed to an address on Occidental; at that address he was referred to another address

in the 1800 block on West Adams Street. In the company of Officer Cline and two other officers he proceeded to the West Adams address, arriving there at approximately 6:45 p.m. Cline looked through a rear window of the building and observed Jackson (a large scar on the left side of his face) seated on a couch. Wright was seated in a chair. Cline communicated his observations to the other officers who were stationed at the front door. Officer Burke then knocked on the front door, identified himself and demanded admittance. Defendant answered the door about one minute later and was placed under arrest. The officers then entered the apartment and placed Wright [sic] and Jackson under arrest. According to Burke, the description of the three men fitted that contained in the robbery report.

A search was made of Jackson at the time of his arrest; as a result, two loose .22 caliber long rifle bullets and a box of 30 shells (same caliber bullet) were recovered from his right pants pocket. The officers also found a .22 caliber revolver, loaded with 8 shells, under a cushion of the couch where Jackson was seated." 216 Cal.App.2d at 868-869, 31 Cal.Rptr. at 433-34

The information known by the arresting officers at the time they arrested appellant and his co-defendants was sufficient to lead a person of ordinary reasonable

judgment, intelligence, care and prudence to believe that they were the three perpetrators of the robberies. Ward v. United States, 316 F.2d 113, 117 (9th Cir.), cert. denied, 375 U.S. 862 (1963); Hollins v. United States, 338 F.2d 227, 229 (9th Cir. 1964), petition for cert. dismissed, 385 U.S. 802 (1966).

It was held in Hollins that the arresting officer had probable cause for the arrest of the defendant where he had trustworthy information that a bank had been robbed not more than an hour previously by a man whose general appearance was similar to that of the defendant and the officer had trustworthy information that the robber could be found at a certain address.

It is not required that probable cause be established fully by facts within the personal knowledge of the arresting officer. A combination of information and personal knowledge may raise the inference beyond opinion, suspicion, and conjecture to reasonable probability. All information in the officer's possession, fair inferences therefrom, and observations made by him are pertinent.

Ng Pui Yu v. United States, 352 F.2d 626, 631 (9th Cir. 1965). Where the arresting officers know that a felony had been committed and have probable cause and reasonable grounds for believing that the person arrested was a knowing participant in the commission of said felony his arrest by the officers without a warrant is lawful. Teasley v. United States, 292 F.2d 460, 465 (9th Cir. 1961).

And, where the officers viewed the occupants in a room through an outside window and observed that they matched the descriptions of the robbery suspects they were seeking, sufficient probable cause to support the subsequent arrest was established. Compton, Burks v. United States, 287 F.2d 117, 123 (9th Cir 1961), cert. denied, 369 U.S. 841 (1962).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the district court denying the writ of habeas corpus should be affirmed.

DATED: April 8, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

MICHAEL J. KELLY
Deputy Attorney General

Attorneys for Appellee

MJK:lp

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: April 8, 1968

MICHAEL J. KELLY
Deputy Attorney General

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YING JACKSON,

Appellant,

vs.

IS S. NELSON, Warden,
Quentin State Prison,

Appellee.

MAR 10 1969

No. 22,402

PETITION FOR REHEARING

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FILED

MAR 10 1969

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRVING JACKSON,

Appellant,

vs.

LOUIS S. NELSON, Warden,
San Quentin State Prison,

Appellee.

No. 22,402

PETITION FOR REHEARING

TO THE HONORABLE STANLEY N. BARNES, GILBERT H. JERTBERG,
AND WALTER ELY, CIRCUIT JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT:

COMES NOW, LOUIS S. NELSON, Warden, San Quentin
State Prison, and pursuant to Rule 40 of the Rules for
Appellate Procedure, Title 28, United States Code,
respectfully requests a rehearing of this Court's decision
of December 12, 1968, in the above-entitled proceeding,
which was to review an order of the United States District
Court for the Northern District of California.

As grounds for rehearing, appellee respectfully
represents:

That this honorable Court has overlooked appellant's
deliberate bypass of his right to appeal from the judgment of
conviction as guaranteed by the State of California. Such a
deliberate bypass of adequate state procedures under which a
claimed violation of federal constitutional rights could have
been raised should preclude appellant from raising his

allegation of constitutional error in federal habeas corpus.
Fay v. Noia, 372 U.S. 391 (1963); Henry v. Mississippi, 379
U.S. 443 (1965); Nelson v. California, 346 F.2d 73 (9th Cir.
1965); Henderson v. Heinze, 349 F.2d 67 (9th Cir. 1965);
Lessard v. Dickson, 394 F.2d 88 (9th Cir. 1968).

There can be no question that appellant was aware
of his right to appeal and chose not to avail himself of that
right. In his petition to the District Court he stated that
he did not appeal because his co-defendant had filed an appeal.

Appellee therefore submits that appellant's deliber-
ate bypass constitutes an adequate independent basis for
affirming the order of the District Court dismissing the
petition.

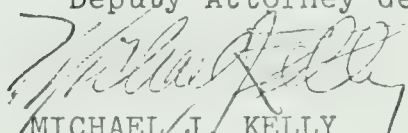
CONCLUSION

For the above reasons, we respectfully urge this
Court to grant a rehearing and to affirm the order of the
District Court.

DATED: December 26, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General


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Attorneys for Appellee

MJK:lp

✓ ✓
Nos. 21957, 22404

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS
MATTHEWS, JR., ROBERT G. RUFİ and EUGENE C.
JONES,

Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF.

BALL, HUNT, HART AND BROWN,
JOSEPH A. BALL,
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FILED

APR 25 1968

Wm. B. LUCK, CLERK

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Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIA-
TION,

Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Facts Showing Jurisdiction of the Appeal.

These are consolidated appeals from two judgments of the United States District Court. The judgments dismissed the action as to certain defendants on the ground that the District Court did not have jurisdiction of the subject matter of the claims stated against these de-

defendants in the plaintiff's second amended and supplemental complaint. The first judgment was entered on April 6, 1967. It dismissed the action as to the defendants Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones. [Webb C. T. 1414-a.]¹ These defendants will sometimes hereinafter be referred to collectively as "Webb" or "the Webb group". The second judgment was entered on August 14, 1967. It dismissed the action as to the defendant Title Insurance and Trust Company. [TI C. T. 14.]

This Court has jurisdiction to review these judgments pursuant to 28 U.S.C.A. 1291, which authorizes the Courts of Appeals to review final decisions of the District Courts. At the time the judgments were made there were left pending certain other claims, including, among others, a claim of the plaintiff against the Federal Home Loan Bank Board, and cross-claims of the Federal Home Loan Bank Board against the Webb group.² The judgments in question were, however, final and appealable when made because the District Court in each judgment expressly determined that there was no just reason for delay, and directed the entry of final judgment, all pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. [Webb C. T. 1414-a; TI C. T. 14.]

¹In this brief we will refer to the Clerk's Transcript in Case No. 21957 as "Webb C. T.". We will refer to the Clerk's Transcript in Case No. 22404 as "TI C. T.".

²The claim of the plaintiff against the Federal Home Loan Bank Board has subsequently been dismissed. An appeal was taken from this judgment, which is pending. The District Court refused to dismiss the cross-claims of the Federal Home Loan Bank Board against the Webb group. The District Court certified its order for interlocutory appeal, but this Court refused to entertain that appeal.

Statutes Involved.

Appellant claims that the United States District Court has jurisdiction of the subject matter of the claims in question based on one or more of the following federal statutes:

1. **Jurisdiction of Actions Involving Controversies With Respect to Notices of Violation of Law Given by the Federal Home Loan Bank Board.**

12 *U.S.C.A.* 1464(d)(1):

“ . . . Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. . . .”

2. **Jurisdiction of Actions Commenced by the Federal Home Loan Bank Board and of Cross Claims in Such Actions.**

28 *U.S.C.A.* 1345:

“Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.”

12 U.S.C.A. 1437(b):

“The Home Loan Bank Board which was, pursuant to Reorganization Plan Numbered 3 of 1947, established and made a constituent agency of the Housing and Home Finance Agency shall, from August 11, 1955, cease to be such constituent agency and shall be an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government: . . . The name of the Home Loan Bank Board is changed to ‘Federal Home Loan Bank Board’.”

12 U.S.C.A. 1464(d)(1):

“. . . The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. . . .”

Rule 13(g), *Federal Rules of Civil Procedure*:

“A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.”

Statement of the Case.

This action was commenced in March 1962 and is now more than six years old. It has been on appeal twice. The first appeal involved an attempt by a member of the Association to intervene in the action. The District Court denied the petition to intervene. (*Beverly Hills Federal Savings & Loan Association v. Federal Home Loan Bank Board* (D.C. S.D. Calif. 1962) 33 F.R.D. 292.) The District Court's refusal to permit intervention was affirmed by this Court. (*Reich v. Webb* (9th Cir. 1964) 336 F. 2d 153.) It was held that the Federal Home Loan Bank Board has the power to assert its cross-claims against Webb on behalf of the Association and that in doing so it is adequately representing the interests of the members of the Association in this action. The second appeal dealt with the validity of a settlement made between the Association, the Board and the Lytton defendants on January 14, 1965, and a dismissal of the Lytton defendants from the action. That appeal was taken by the Webb group and was dismissed because they had no appealable interest. (*Webb v. Beverly Hills Federal Savings & Loan Assn.* (9th Cir. 1966) 364 F. 2d 146.)

During the course of the last six years, numerous depositions have been taken. The case was nearing a pretrial conference when the court dismissed the action as between the Association and the Webb group. The following evidence developed through discovery will enable the court to better understand the nature of the case and the allegations contained in the Association's second amended and supplemental complaint.

**Status of the Beverly Hills Federal
Savings and Loan Association.**

The Beverly Hills Federal Savings and Loan Association is a federally chartered savings and loan association. The members of the Association consist of its depositors and borrowers. Akin to the stockholders of a corporation, they are entitled to select the management of the Association through the election of directors. Proxies in favor of management are solicited from depositors when they open savings accounts and from borrowers as they obtain loans.

The Webbs Controlled the Association.

For many years prior to March, 1961, the Webb group controlled the Association. They were able to exercise control through the proxies solicited from members. The proxies held by the Webbs designated the following persons, in the order named, to vote at the annual meetings: Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Eugene Webb, III, and Robert G. Rufi. [Webb Depo. 54.]³

These persons are all related to each other by blood or marriage. Marguerite R. Webb is the wife of Eugene Webb, Jr. Richards Matthews, Jr., is Eugene Webb, Jr.'s nephew. Eugene Webb, III, is the son of Eugene Webb, Jr., and Marguerite R. Webb. Robert G. Rufi is Marguerite R. Webb's brother. [Webb Depo. 52-54.]

By virtue of the proxies held by the Webbs, they were able to appoint the directors of the Association,

³Depositions were taken of both Eugene Webb, Jr. and Marguerite R. Webb. In this brief we will refer only to the deposition of Eugene Webb, Jr.

who in turn appointed the officers. Eugene Webb, Jr., was a director, and also the president and chief executive managing officer. [Webb Depo. 53-54.] His wife, Marguerite R. Webb, was the chairman of the board of directors, and a vice president. [Webb Depo. 45-46.] The other three directors were: Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones. [Webb Depo. 45.] Jones was the only director not related to the Webbs.

Webb Ownership of Satellite Company.

Under laws formerly in effect, federal savings and loan associations were not permitted to engage in escrow, insurance and other related business.⁴ But the management of an association can control the referral of this type of business. Many borrowers do not care who writes the fire insurance on their property, or who issues the title insurance. The association customarily designates the escrow holder of the loan escrow, and it also nominates the trustee under the deed of trust executed by the borrower. [Kull Depo. 74-81.]

In order to capitalize upon the profits to be derived from this kind of business, the Webbs owned and operated another company called the Southland Mortgage Company. [Webb Depo. 23-26.] This company conducted an escrow, insurance, title and loan service business. In 1949, the Webbs acquired all of the outstanding stock of Southland Mortgage Company. [Webb Depo. 26, 27.] The Association referred all of its own

⁴Under a law passed in 1964, a federal savings and loan association is now authorized to invest up to one percent of its assets in a company engaging in a related business. (12 U.S.C.A. 1464(c), as amended by Public Law 88-560, 78 Stat. 804-806.)

insurance, title and escrow business to the Southland Mortgage Company and, within the limits of the law, the staff of the Association suggested to borrowers that they write the fire insurance on their homes through this company. [Webb Depo. 26, 27; Kull Depo. 74-78.]

In March 1958, the Webbs liquidated the Southland Mortgage Company and concurrently formed a new company called the Southland Company. [Webb. Depo. 38.] The existing business done by the old company, including pending escrows, was transferred to the new company. [Kull Depo. 54-55.] The Webbs contributed a total of \$5,000 toward the formation of the new company. [Brittain Depo., Exs. 10, 14, 15, 16.] It was estimated that approximately 90 percent of the escrow and insurance business conducted by the Southland Company was referred to it by the Association. [Kull Depo. 74, 76, 78.] By March 1961, the Southland Company was earning a net profit of approximately \$120,000 per year. [Webb Depo. 214.]

The Creation of the Webb Trust.

In May 1958, the Webbs created a trust for their two children. [Webb Depo. 39.] They named themselves and the Title Insurance and Trust Company as the trustees. [Webb Depo. Ex. 1.] The trust indenture provided that any two of the trustees could make decisions for the trust. After forming the trust, the Webbs transferred their stock in the Southland Company to the trust. [Webb Depo. 39.] At the time, the Southland Company was paying dividends of \$12,000 per year upon an initial investment of \$5,000. [Brittain Depo. 20, 57.]

**Eugene Webb, Jr. Makes a Proposal to
Thomas Clarke.**

Webb had initially considered converting or merging the Association into a state association. [Webb Depo. 456, 462.] He contacted representatives of other savings and loan holding companies, but concluded there was no possibility of merger or conversion. [Webb Depo. 426; Clarke Depo. 21, 22.]

Early in 1961, at a savings and loan convention in Palm Springs, Webb told Thomas Clarke that he wanted to talk to him about the Association when they returned to Los Angeles. [Clarke Depo. 8-9.] Clarke was the general counsel and vice president of Lytton Financial Corporation. [Clarke Depo. 7.] Clarke considered any offer from Webb about the Beverly Hills Federal Savings and Loan Association as a "corporate opportunity" of the Lytton Financial Corporation. [Clarke Depo. 32.] Clarke reported the conversation to his superior, Bart Lytton. [Clarke Depo. 11-12.] Lytton urged Clarke to be certain to contact Webb when he returned to Los Angeles. [Clarke Depo. 13.]

**Thomas Clarke Refers the Proposal
to Bart Lytton.**

Upon their return to Los Angeles, Webb and Clarke met in Webb's office at the Association. [Clarke Depo. 14-15.] Webb suggested that Clarke take over the presidency of the Association. [Clarke Depo. 15-17.] Webb explained the Southland Company operation to Clarke and told him that he wanted to make certain that its operations would not be affected by a change-over. [Webb Depo. 127.] He gave Clarke the financial statements for the Southland Company. [Clarke

Depo. 17; Webb Depo. 150.] A possible sale of the Southland Company to Clarke was discussed, but Clarke did not have the funds. [Clarke Depo. 27.]

The offer of the presidency of the Association did not appeal to Clarke. If he terminated his employment with the Lytton Financial Corporation, he would lose valuable stock options. [Clarke Depo. 24.] Clarke suggested to Webb that Bart Lytton be brought into the picture. [Webb Depo. 166.] Webb had no objection but advised Clarke that he must “control” him. [Clarke Depo. 23.]

Bart Lytton forthwith took over direct negotiations with Webb. They immediately discussed the operations of the Southland Company and the proxies held by Webb. [Webb Depo. 193, 212.] Their discussions eventually led to a proposition whereby the Lytton Financial Corporation would purchase the stock of the Southland Company and Clarke would take over the control of the Association. [Webb Depo. 206, 212, 216.] Lytton and Webb dickered like two school boys over the price. Clarke believed that Lytton offered Webb too much money. Before Webb could turn down an offer, Lytton “sweetened” it. [Clarke Depo. 47, 48.] Eventually Webb and Lytton reached an understanding whereby Lytton Financial Corporation would purchase the stock of the Southland Company for \$1,500,000, give the Webbs a five-year personal service contract for an additional \$300,000, and Clarke or Lytton would take over the management of the Association. [Clarke Depo. 48-52, 56-57; Webb Depo. 218-222.]

Clarke was requested to draft the necessary agreement in conjunction with Webb’s lawyer. [Clarke

Depo. 52, 53.] Within a few days the agreement was drafted and approved. The agreement, dated March 9, 1961, took the form of these documents:

- (1) A Buy and Sell Agreement between the Webbs, as trustees for their children, and the Lytton Financial Corporation. [Clarke Depo. Ex. B.] The Webbs agreed to sell all the outstanding stock of the Southland Company to the Lytton Financial Corporation for \$1,500,000. Among other provisions, the Agreement provided:

“The Sellers further acknowledge that the principal source of income and major customer of the Southland Company is the . . . Association, and that the Sellers will do any and all things necessary, and execute any and all necessary documents or agreements, as may be required by the Buyer in order to assure the continuance of the present business relationship between the Southland Company and the . . . Association.”

- (2) The Webbs assigned their proxies from the members of the Association by substituting nominees of the Lytton Financial Corporation as the proxy holder “for a good and valuable consideration”. [Clarke Depo. Ex. A.]
- (3) A Personal Service Agreement between the Webbs and the Lytton Financial Corporation whereby the Webbs would receive \$60,000 a year for five years as “independent contractor consultants”. [Clarke Depo. Ex. C.]

On March 14, 1961, Webb called a meeting of the board of directors of the Association for the morning and a meeting of the Southland Company for the

afternoon of the same day. The meetings had all been pre-arranged by Webb. Prior to the meetings, Webb had advised the other directors that he was going to sell the Southland Company, and resign as president of the Association and be replaced by Thomas Clarke. [Webb Depo. 66-71.]

At the board meeting, all the directors executed and delivered their resignations to Webb. The directors who were proxy holders signed the proxy substitution agreement in favor of the nominees of the Lytton Financial Corporation. [Clarke Depo. Ex. A; Webb Depo. 74-76.] The meeting was adjourned to be reconvened in the afternoon at the Title Insurance and Trust Company in Los Angeles.

During the afternoon two different meetings were held, although there was no interval between the two. One was a meeting of the directors of the Southland Company and the other was the continuation of the adjourned meeting of the directors of the Association. [Kull Depo. Exhs. 1 and 2; Webb Depo. 82-88.] Representatives of the Lytton Financial Corporation were present for these meetings. During the meeting of the Southland Company, the sale of the stock to the Lytton Financial Corporation was consummated for \$1,500,000. [Webb Depo. 84, 85]. During the continuation of the adjourned meeting of the Association's board of directors, the Webb groups' resignations as directors, which had been executed at the morning meeting, were accepted. [Webb Depo. 83.] Nominees of the Lytton Financial Corporation were selected as directors to take their place. [Webb Depo. 88.] At Bart Lytton's request, after the meeting the employees of the Association and the Southland Company were notified that there would be no changes in policy. [Webb Depo. 290-299.]

The Federal Home Loan Bank Board eventually learned of the transaction and took steps to rectify it.

Notice of Violation.

On January 26, 1962, the Federal Home Loan Bank Board (hereinafter "the Board") gave notice of alleged violations of law arising out of the transaction. This notice charged, among other things: (1) that the proxy sale was an illegal transaction; (2) that the Webb group had obtained a secret profit by selling their proxies to the Lytton group; and (3) that the election of the Lytton group was not proper. The Board's notice of January 26, 1962, is attached to various of the pleadings in the Clerk's Transcript. [See, *e.g.*, Webb C. T. 8-14.] For convenience, a copy thereof is reproduced as Appendix "A" to this brief. When the violations were not corrected, the Board adopted a second resolution alleging the same charges. [Webb C. T. 75.]

The Pleadings.

On February 20, 1962, the Association filed this suit, seeking a declaratory judgment with respect to the Board's notice of violations of law. [Webb C. T. 82.] On April 23, 1962, the Association filed a first amended complaint. [Webb C. T. 82.] This pleading added the Webbs and Lyttons as parties defendant. As the Association was then controlled by Lytton, the Association's position at that time was that the transactions complained of did not constitute violations of law. [Webb C. T. 4, lines 3-7; 85, lines 6-21.]

In its answer, filed July 2, 1962, the Board alleged, as it had in its notice of violation: (1) that the sale of proxies was an illegal transaction; (2) that Webb had realized secret profits; and (3) that Lytton had been improperly elected. The Board asserted cross-claims

against Webb and Lytton, and sought judgment: (1) removing Lytton from management; (2) ordering the election of an independent board of directors of the Association; and (3) requiring the Webbs to restore to the Association the consideration they had received for the sale of proxies. [Webb C. T. 188-217.]

The pleadings remained in this status until 1965. In January of 1965, Lytton agreed to relinquish management of the Association, and an independent board of directors was elected.⁵ Thereafter the Lytton group was dismissed from the action. The Webb group appealed from the dismissal, but their appeal was dismissed on the ground that they had no appealable interest. (*Webb v. Beverly Hills Federal Savings & Loan Assn.* (9th Cir. 1966) 364 F. 2d 146.) The Association was then for the first time controlled by an independent board of directors. On May 10, 1965, the Association filed a second amended and supplemental complaint. This is the pleading which the District Court dismissed for lack of jurisdiction, and which is the subject of this appeal.

The second amended and supplemental complaint alleges, in pertinent part, as follows: (1) the facts constituting the Webb-Lytton transaction [Webb C. T. 753]; (2) the Board's notice of violation made on January 26, 1962 [Webb C. T. 755]; (3) the correction of

⁵The Board, the Association and Lytton entered into a stipulation for settlement on January 14, 1965. The terms of the settlement were that: the proxies of the members of the Association, which Lytton had purchased from Webb, were transferred to the Board; Lytton agreed to sell the stock in Southland Company (the satellite) to the Association; and Lytton resigned from management of the Association and Southland Company. [Webb C. T. 615.] In 1964 the law had been amended to permit savings and loan associations to invest in satellite companies. (12 U.S.C.A. 1464(c), as amended by Public Law 88-560, 78 Stat. 804-806.)

the violation with respect to Lytton management by way of election of an independent board of directors [Webb C. T. 756]; and (4) the existence of a controversy between the parties with respect to the remaining matters charged as violations in the Board's notice of January 26, 1962. [Webb C. T. 757.]⁶

The controversy remaining as between the Association and the Webb group is that the Association (now controlled by an independent board of directors) seeks judgment in the amount of the consideration Webb received from Lytton which constitutes a profit from the sale of proxies. [Webb C. T. 758.] This is essentially the same claim asserted by the Board in behalf of the Association in the Board's cross-claims against the Webb group.

The remaining controversy between the Board and the Association is not specified in the first amended complaint, but was determined in subsequent proceedings to involve two points: (1) The Board contends that the Webbs are additionally liable to the Association for punitive damages, and (2) the Board contends that the Association is precluded from rehiring anyone from the Webb group. [Webb C. T. 1413-1414.]

On August 30, 1965, Webb moved to dismiss the second amended and supplemental complaint on the grounds: (1) that the District Court does not have jurisdiction; (2) that no claim was stated; and (3) that the action was barred by the statute of limitations. [Webb C. T. 925.] This motion was overruled by a

⁶Title Insurance & Trust Company was also added as a defendant for the purpose of facilitating the enforcement of any orders made by the court with respect to the shares of the satellite company which were held in trust. [Webb C. T. 756.]

Memorandum Opinion filed January 19, 1966. [Webb C. T. 1053.] With respect to jurisdiction, the District Court held that it had jurisdiction when the action was first filed under 12 U.S.C.A. 1464(d)(1) because of the controversy between the Board and the Association, and that it did not lose jurisdiction by the subsequent compromise with Lytton in 1965. [Webb C. T. 1055-1056.]

Thereafter Webb moved to certify this order for interlocutory appeal. [Webb C. T. 1060.] At the hearing of this motion the court indicated that it would reconsider the motion to dismiss and ordered the parties to file additional briefs on the question of jurisdiction. The question was extensively briefed again [Webb C. T. 1092-1288]; and on September 30, 1966, the court ordered the parties to file affidavits to show the specific matters remaining in controversy between the Association and the Board. [Webb C. T. 1286.] Thereafter the parties filed affidavits and further briefs. [Webb C. T. 1291-1313, 1368-1408.] The affidavits showed that the remaining controversy between the Board and the Association was that the Board and the Association were not agreed as to whether the Webb group was liable for punitive damages or whether the Association should be precluded from rehiring anyone from the Webb group.

On April 6, 1967, the District Court reversed its prior ruling and dismissed the action as to the Webb group for lack of jurisdiction. The court held that the only basis of jurisdiction was 12 U.S.C.A. 1464(d)(1),

which provides that either the Board or an association may bring suit in the District Court when the Board has given notice of violation of law; that such suits are limited to controversies between the Board and the association; and that the controversies remaining between the Board and the Association in this case, namely, Webb's liability for punitive damages and rehiring of Webb, are not sufficient controversies to constitute a basis for federal jurisdiction. [Webb C. T. 1413-1414.] The action was subsequently dismissed as to Title Insurance & Trust Company on the same ground. [TI C. T. 14-15.]

As noted earlier in the jurisdictional statement in this brief, the remaining claims of the Association against the Board were subsequently dismissed by the Court. An appeal has been taken from this judgment which is pending. By cross-claims the Board also asserts against Webb essentially the same claim made by the Association against Webb in its second amended and supplemental complaint. [Webb C. T. 199-207.] The District Court has subsequently refused to dismiss these cross-claims. The order was certified for interlocutory appeal, but this Court refused to entertain that appeal.

Summary of Argument.

1. 12 U.S.C.A. 1464(d)(1) is not limited to controversies between the Board and an association. The statute provides that when the Board gives notice of violation, either the Board or the association may apply to the District Court "for a declaratory judgment and

an injunction or other relief with respect to such controversy". The words "such controversy" refer to the Board's notice of violation and not to some other collateral controversy which may or may not exist between the Board and the association depending on who happens to control the association at the time. The controversy set forth in the Board's notice of violation in this case was not in reality any controversy between the Board and the Association. The notice charged that Webb had obtained a secret profit which belonged to the Association and that Lytton had been improperly elected pursuant to the illegal proxy sale. These are matters of controversy between the Board and the Association on the one hand, and Webb and Lytton on the other. The remedy provided by the statute would be useless if limited to merely adjudicating whether the Association should agree with the Board's position with respect to the controversy.

2. If jurisdiction over the Association's claim against Webb cannot be based on 12 U.S.C.A. 1464(d)(1), there is nevertheless jurisdiction of the Board's assertion of this claim under either 12 U.S.C.A. 1464(d)(1) or 28 U.S.C.A. 1345. This Court held in *Reich v. Webb* (9 Cir. 1964), 336 F. 2d 153, that the Board has the power to assert the claim against Webb under 12 U.S.C.A. 1464(d)(1). There is also jurisdiction of the Board's claim against Webb under 28 U.S.C.A. 1345. Section 1345 confers jurisdiction of all suits commenced by the United States or its agencies,

and the Board is a United States agency. The Board's claim against Webb was asserted against both the Association (in the Board's answer) and against Webb (in its cross-claim). Under Rule 13 of the Federal Rules of Civil Procedure, the Association is entitled to assert its claim against Webb as a cross-claim. The District Court has ancillary jurisdiction to entertain the Association's claim since it arises out of the same transaction or occurrence as the Board's claim. An independent basis of jurisdiction is not needed to support a transaction-related cross-claim. There can be no question but that these claims arise out of the same transaction or occurrence. The Board's and the Association's claims against Webb are practically identical.

ARGUMENT.

I.

The District Court Has Jurisdiction of the Association's Claim Against Webb Under 12 U.S.C.A. 1464(d)(1).

12 U.S.C.A. 1464(d)(1) expressly confers federal jurisdiction to adjudicate controversies raised by the Board upon giving a notice of violation of law. The statute provides, in pertinent part, as follows:

“Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders.”

The notice of violation which the Board is authorized to give, and which the federal courts may adjudicate, is not limited to enforcement of the provisions of 12 U.S.C.A. 1464 or of the Board's rules and regulations made thereunder. The scope of the Board's authority is defined in 12 U.S.C.A. 1464(d)(1) as follows:

“The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, *or any other law or regulation*, and in the administration of conservatorships and receiverships as provided in

paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys.” (Emphasis added.)

In *Reich v. Webb* (9th Cir. 1964), 336 F. 2d 153, 156-158, it was contended by Reich, who was there attempting to intervene in this action, that under the doctrine of *ejusdem generis*, the Board’s authority was limited to enforcement of §1464 and its rules and regulations made thereunder. Reich claimed that the Board’s notice of violation in this case does not involve enforcement of such law or rules and regulations, but only an attempt to enforce the common law liability of directors for breach of their fiduciary duties. This Court held, however, that the scope of the Board’s authority is not so limited. The statute expressly provides for enforcement of “*any other law or regulation*”. The Board has authority under 12 U.S.C.A. 1464(d)-(1) to enforce the liability of the Webb group to account for the secret profits realized from the proxy sale and to give the notice of that violation of law which is the subject of this lawsuit.

This controversy which the Board is authorized to raise is not in reality any controversy between the Board and the Association. The Board has never claimed, and certainly its notice of violation does not claim, that the Association has any liability to the Board or anyone else. The only claim, and hence the only controversy, is whether or not the Webb group must account to the Association for the secret profit realized. The fact that the Association once disagreed with the Board and now aligns with the Board’s position, at least in part, is immaterial. The statute does not authorize the Association to give notice of violations of

law. Only the Board may do so. The Board's notice necessarily defines the controversy, and whatever position the Association may or may not take is immaterial. It is possible, of course, that the Association may create some additional or collateral controversy by disagreeing with the Board, as was the case here until 1965, and is still the case to some extent. But that cannot change the basic controversy which the Board establishes by giving its statutory notice of violation.

Once the notice of violation is given, either the Association or the Board may seek judicial review and enforcement. Either the Association or the Board may apply "for a declaratory judgment and an injunction or other relief with respect to such controversy." (12 U.S.C.A. 1464(d)(1).) In most cases, and certainly in this one, the grant of jurisdiction would mean very little, if limited to determining only the collateral controversy which might exist by way of a difference of opinion between the Board and the Association. Such a limited construction of the statute would leave undetermined the real controversy raised by the Board's notice of violation. 12 U.S.C.A. 1464(d)(1) should not be so limited. It expressly provides for judicial review and enforcement of the Board's notice of violation. In this case the Board was authorized to give the notice of the violation of law by the Webb group, and the Board is authorized to sue to enforce Webb's liability to the Association. (*Reich v. Webb* (9th Cir. 1964), 336 F. 2d 153.) Both the Association and the Board are authorized to apply to the United States District Court "for a declaratory judgment and an injunction or other relief with respect to such controversy." (12 U.S.C.A. 1464(d)(1).) The statute ex-

pressly confers federal subject matter jurisdiction to adjudicate this controversy.

Stated another way, the question amounts to this. By virtue of 12 U.S.C.A. 1464(d)(1) the District Court has jurisdiction of the controversy raised by the Board's notice of violation, and either the Board or the Association may commence the suit. Who do the Board or the Association sue in invoking the court's jurisdiction? Are they limited to suing each other, thereby leaving the litigation undetermined as to the individual officers and directors who are the real objects of the controversy? The statute does not contain any such limitation, and there is no sound basis for reading such a limitation into the statute. To do so would lead to an absurd result. The real parties in interest in respect of the controversy in this case are the Webb group. It would accomplish nothing to determine only what position the Association should take with respect to the Board's notice of Webb's violation. The objective of the statute can only be achieved by bringing before the court the real parties in interest and adjudicating their rights and liabilities.

In a sense, 12 U.S.C.A. 1464(d)(1) is similar to 28 U.S.C.A. 1345 which confers jurisdiction of suits commenced by the United States and its agencies. 28 U.S.C.A. 1345 does not say who the United States can sue. The only reasonable interpretation is that the United States can sue anyone against whom it has a claim and over whom it can obtain personal jurisdiction. 12 U.S.C.A. 1461(d)(1) is different only in that it is restricted to a particular type of case, namely, controversies raised by the Board's notices of violation of law. This is not a restriction of the type of

person who can be sued. Insofar as parties are concerned, 12 U.S.C.A. 1464(d)(1) is no different than 28 U.S.C.A. 1345. Neither statute specifies who may be named as a defendant. The only logical inference to be drawn is that the defendants shall be the persons against whom a claim can be stated. In this case the Webb group are such persons. The Board's notice alleges that the Webbs are liable to the Association for the money received from the sale of proxies. 12 U.S.C.A. 1464(d)(1) permits either the Board or the Association to sue to adjudicate and enforce that claim.

II.

The District Court Has Jurisdiction of the Board's Claim Against Webb Under Either 12 U.S.C.A. 1464(d)(1) or Under 28 U.S.C.A. 1345; There Is Ancillary Jurisdiction of the Association's Claim Against Webb as a Cross-Claim.

The question of whether the District Court has jurisdiction to entertain the Board's claim against Webb under 12 U.S.C.A. 1464(d)(1) is no longer open because of the decision in *Reich v. Webb* (9th Cir. 1964) 336 F. 2d 153. When an issue in a case is finally decided on appeal, that determination becomes the "law of the case" and will not be re-examined on a subsequent appeal. (*General American Life Ins. Co. v. Anderson* (6th Cir. 1946) 156 F. 2d 615, 618; *Atlas Scraper & Engineering Co. v. Pursche* (9th Cir. 1966) 357 F. 2d 296, 297; *White v. Murtha* (5th Cir. 1967) 377 F. 2d 428, 431.)

Shortly after this action was filed, Reich sought to file a complaint in intervention as a member of the Association. Reich's complaint set forth the same claim against Webb that the Board asserted against the As-

sociation (by its answer) and against Webb (by its cross-claims). That claim (which the Association also now asserts in its second amended and supplemental complaint) is that the Webb group personally profited by selling the proxies to Lytton and are liable to account to the Association for the consideration received because the proxies and the consideration received therefor are assets rightfully belonging to the Association and its members [Webb C. T. 98.] Reich's petition for intervention was denied and affirmed on appeal. In affirming the denial of Reich's petition, this Court said that the narrow question presented was "whether the District Court properly refused appellant's [Reich's] motion to intervene", but that the answer to this question depends upon "whether the Home Loan Bank Board has the power to enforce by court action common law fiduciary responsibilities of savings and loan association officers and directors." (*Reich v. Webb* (9th Cir. 1964) 336 F. 2d 153, 155.)

It was concluded that the Board does have such power and that it is adequately representing the interests of Reich in this case. Hence, Reich was not entitled to intervene as a matter of right. The decision in *Reich v. Webb* necessarily holds that the District Court has jurisdiction of the Board's claim against Webb. At that time only the Board was asserting the Webb claim. If there was no jurisdiction to entertain the Board's claim Reich would have to have been permitted to intervene because he was the only other person then seeking to make this claim. But it was held that the Board is properly seeking to enforce the claim against Webb. 336 F. 2d at 156:

"... we conclude that the Bank Board has power by virtue of 12 U. S. C. §1464(d)(1) to secure all

relief sought by appellants, and therefore they are 'adequately represented' so as to preclude intervention as a matter of right under Rule 24(a), F. R. Civ. P."

If the question is to be re-examined, and if jurisdiction cannot be predicated on 12 U.S.C.A. 1464 (d)(1) on the theory that this statute permits the Board and the Association only to sue each other, jurisdiction can be based on 28 U.S.C.A. 1345. 28 U.S.C.A. 1345 confers jurisdiction of all "actions, suits or proceedings commenced by the United States, or any agency or officer thereof expressly authorized to sue by Act of Congress." This statute bases subject matter jurisdiction on the status of the plaintiff, as distinguished from the nature of the claim itself. For example, in *Acron Investments, Inc. v. Federal Savings & Loan Ins. Corp.* (9th Cir. 1966) 363 F. 2d 236, the Federal Savings & Loan Insurance Corporation brought suit to foreclose deeds of trust. The trust deeds had been owned initially by a savings and loan association, and prior to suit had been assigned to the Federal Savings & Loan Insurance Corporation. The savings and loan association could not have sued in the federal court to enforce these obligations. There was no federal question involved, and there was no diversity of citizenship between the savings and loan association and the persons who executed the trust deeds. However, when the trust deeds were assigned to the Federal Savings & Loan Insurance Corporation, suit to foreclose them could be brought in the federal court because of the status of the Federal Savings & Loan Insurance Corporation as an agency of the United States. The status of the Federal Home Loan Bank

Board is the same. It is expressly declared by Act of Congress to be an agency of the United States. (12 U.S.C.A. 1437(b).) It is also expressly authorized to sue by Act of Congress. (12 U.S.C.A. 1464(d)(1).)

Thus, if it is assumed that the Association could not sue Webb in the first instance because 12 U.S.C.A. 1464(d)(1) only authorizes the Association to sue the Board, the same limitation would not apply to the Board. The Board, being an agency of the United States, can assert any claim it has against anyone pursuant to 28 U.S.C.A. 1345. When the Board filed its answer and cross-claim, it did assert this identical claim against the Association (by its answer) and against the Webbs (by its cross-claims). If the Association had not commenced the lawsuit, and if instead the Board had sued the Association and the Webbs and asserted the claim in a complaint, there would be no question but that there would be jurisdiction under 28 U.S.C.A. 1345.

Should it make any difference that the Board did not sue first? To make such a distinction would be to sacrifice substance for form. The substance of the situation is that when the Board filed its answer and cross-claims, it invoked the court's jurisdiction under 28 U.S.C.A. 1345 just as if it had filed a complaint naming the Association and the Webb group as defendants. The difference is only in the form of the pleadings that were filed.

If any distinction were to be made based on the form of the pleadings filed, it would have to depend on a limitation of the court's jurisdiction under 28 U.S.C.A. 1345 to complaints filed by the United States and its agencies, as distinguished from claims asserted

in other pleadings. But section 1345 contains no such limitation. It does not confer jurisdiction only in cases where the United States files a complaint. There is jurisdiction under 28 U.S.C.A. 1345 of "all civil actions, suits or proceedings commenced by the United States". This language is even broader than that used in other jurisdictional statutes. For example, in 28 U.S.C.A. 1332, which provides for diversity cases, only the words "civil actions" are used. When a complaint is dismissed, ordinarily any counterclaims are also dismissed unless there is an independent basis of jurisdiction for the counterclaims. If there is diversity of citizenship the counterclaim remains as if it had been originally asserted in a complaint. (*Pioche Mines Consolidated, Inc. v. Fidelity-Philadelphia Trust Co.* (9th Cir. 1953) 206 F. 2d 336.) Thus, the words "civil actions" as used in 28 U.S.C.A. 1332, are not construed to mean only the filing of a complaint. "Civil actions" means the assertion of a cause of action in any other type of pleading. 28 U.S.C.A. 1345 should be given the same construction, as its language is even broader. Section 1345 confers jurisdiction, not only of "civil actions", but also of "suits and proceedings" commenced by the United States and its agencies. The Bank Board's assertion of its cross-claim against Webb is a civil action, suit or proceeding commenced by an agency of the United States. We submit that the District Court has jurisdiction of the Board's claim either under 12 U.S.C.A. 1464(d)(1), as decided in *Reich v. Webb* (9th Cir. 1964) 336 F. 2d 153, or under 28 U.S.C.A. 1345 because the Board is an agency of the United States.

Once it is determined that there is jurisdiction of the Board's claim against Webb, it necessarily follows that

there is ancillary jurisdiction to entertain the Association's essentially identical claim asserted in its second amended and supplemental complaint. The Association's claim against Webb is, in effect, a cross-claim. Rule 13(g) of the *Federal Rules of Civil Procedure* provides that a "pleading may state as a cross-claim any claim against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." There is no question that the Association's claim is related to the same occurrence or transaction. It is essentially the same claim asserted by the Board. It is not necessary to have an independent basis of jurisdiction for a transaction-related cross-claim, as the court then has ancillary jurisdiction. (*Scott v. Fancher* (5th Cir. 1966) 369 F. 2d 842, 844.)

It is also immaterial that the Board's answer and cross-claims were not designated as a "complaint", and that the second amended and supplemental complaint is not labelled a "cross-claim". Rule 8(f) of the *Federal Rules of Civil Procedure* provides that all "pleadings shall be so construed as to do substantial justice." It has been held that the status of a pleading is not determined by its title, but according to its substance. In *Rubenstein v. United States* (10th Cir. 1955) 227 F. 2d 638, 642, the court treated a motion under 28 U.S.C.A. 2255 as a motion for new trial, and said: "There is no controlling magic in the title, name, or description which a party litigant gives to his pleading. The substance rather than the name or denomination given to a pleading is the yardstick for determining its character and sufficiency." In *Falciani v. Philadelphia*

Transportation Co. (D.C.E.D. Pa. 1960) 189 F. Supp. 203, 204, a defendant entitled his pleading a "counterclaim", whereas it should have been a cross-claim. The court said: "We think it clear that the P.T.C. may assert a claim against Battiliano for damage to the P.T.C. bus. Whether this claim is called a 'counterclaim' or a 'cross-claim' is of no significance. Therefore, we shall allow the claim to stand." In *Baker v. Sisk* (D.C. E.D. Okla. 1938) 1 F.R.D. 232, 236, the question was whether a motion to dismiss could be treated as an answer. The court held:

"This is to be determined not by the designation given it by the defendants but by the contents of the pleading. The name given to a pleading does not change the nature of the pleading. And, although the defendants have designated the pleading a motion to dismiss, it is, we think, in fact an answer and will be treated as such."

Conclusion.

The District Court has jurisdiction of the Association's claims asserted against the Webb group and Title Insurance and Trust Company in the second amended and supplemental complaint on either of the following grounds:

1. 12 U.S.C.A. 1464(d)(1) authorizes the Association to sue in the Federal Court for an adjudication with respect to the controversy raised by the Board's notice of violation of law. In such cases the District Court is expressly granted jurisdiction to adjudicate the controversy as in other cases and to enforce its order. The statute does not limit the Association to suing the Board alone, and the jurisdictional grant would be mean-

ingless if so construed. The real parties in interest are the Webb group. It is their rights and liabilities, and not the Association's, that are brought in question by the Board's notice of violation. 12 U.S.C.A. 1464(d)(1) confers jurisdiction to adjudicate this controversy.

2. If jurisdiction of the Association's claims against Webb is not found in 12 U.S.C.A. 1464(d)(1), there is nevertheless, ancillary jurisdiction to entertain the Association's claim. The District Court has jurisdiction of the Board's claim against Webb under either 12 U.S.C.A. 1464(d)(1) or 28 U.S.C.A. 1345. The Association's claim is essentially the same as it arises out of the same transaction. It is, in effect, a transaction-related cross-claim under Rule 13 of the Federal Rules of Civil Procedure. In such cases no independent basis of jurisdiction is needed to support the claim.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH D. MULLENDER, JR.

APPENDIX "A."

FEDERAL HOME LOAN BANK BOARD

No. 15,430

Date: January 26, 1962

WHEREAS, Beverly Hills Federal Savings and Loan Association, Beverly Hills, California, Lytton Savings and Loan Association, Hollywood, California and Home Foundation Savings and Loan Association of Palo Alto, Palo Alto, California are institutions whose accounts are insured under Title IV of the National Housing Act, as amended, 12 U.S.C. § 1724 *et seq.*, and WHEREAS, Beverly Hills Federal Savings and Loan Association, Beverly Hills, California is a Federal Savings & Loan Association, chartered by the Federal Home Loan Bank Board under the provisions of Section 5(a) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. § 1464(a) and subject to the Rules and Regulations of the Federal Home Loan Bank Board, and

WHEREAS, prior to and since the 9th day of March, 1961, Lytton Savings and Loan Association, Hollywood, California and Home Foundation Savings and Loan Association of Palo Alto, California are and have been owned and controlled by the Lytton Financial Corporation, a corporation organized under the laws of the State of Delaware, with its principal office in Hollywood, California, and

WHEREAS, prior to, and for some time on, the 14th day of March, 1961, the Beverly Hills Federal Savings and Loan Association, Beverly Hills, California, had a five-member Board of Directors, of which Board of Directors, Eugene Webb, Jr. was President and a Di-

rector and Marguerite R. Webb was First Vice-President and Chairman of the Board of Directors, respectively, and Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones were the remaining members of said Board of Directors, and

WHEREAS, on or about the 9th day of March, 1961, Lytton Financial Corporation, acting by and through Thomas W. Clarke, its Senior Vice-President (and Attorney), entered into a "Buy and Sell Agreement" to purchase all of the outstanding capital stock of the Southland Company, a mortgage banking, escrow and insurance company from a trust or trusts controlled by Eugene Webb, Jr. and Marguerite R. Webb (with the third and corporate trustee being the Title Insurance and Trust Company, 433 South Spring Street, Los Angeles, California), for the benefit of their children, and in which "Buy and Sell Agreement" the consideration payable by the Buyer was \$1,500,000 in cash to the Trust and a Personal Service Agreement described hereinafter of Eugene Webb, Jr. and Marguerite R. Webb with a further consideration to them of \$300,000, payable in annual installments of \$60,000, and

WHEREAS, a pertinent paragraph of the aforesaid "Buy and Sell Agreement" of March 9, 1961 provided that Eugene Webb, Jr. and Marguerite R. Webb would do any and all things necessary and execute any and all necessary documents as Lytton Financial Corporation might require to assure the continuance of the present business relationship between the Southland Company and the Beverly Hills Federal Savings and Loan Association, and

WHEREAS, all warranties made by the "Sellers" in the aforesaid "Buy and Sell Agreement" were the war-

warranties of Eugene Webb, Jr. and Marguerite R. Webb and the corporate trustee neither joined in these warranties nor executed the agreement as co-trustee of this trust for the benefit of the Webb children, and

WHEREAS, as a follow-up agreement to the "Buy and Sell Agreement" of March 9, 1961, a "Personal Service Agreement" was entered into on March 14, 1961 between Lytton Financial Corporation and Eugene Webb, Jr. and Marguerite R. Webb whereby Lytton Financial Corporation, identified in the "Personal Service Agreement" as the "Buyer", agreed to pay the sum of \$300,000 over a 5-year period to Eugene Webb, Jr. and Marguerite R. Webb, irrespective of whether either or both of said parties survive the period of the Agreement and are, in fact, able and do perform the services, and

WHEREAS, on or about the 14th day of March, 1961, a regular meeting of the Board of Directors of the Beverly Hills Federal Savings and Loan Association was held in the morning in the offices of the Association, which meeting was adjourned at 10:00 a.m. and reconvened for a further session at 1:30 p.m. at the offices of the Title Insurance and Trust Company, 433 South Spring Street, Los Angeles, California, and

WHEREAS, Bart Lytton, President, Chairman of the Board and a Director of Lytton Financial Corporation, Thomas W. Clarke, Vice-President, a Director and Counsel for Lytton Financial Corporation, Maurie Starrels, Secretary, Treasurer and a Director of Lytton Financial Corporation and Samuel J. Sills, a Director of Lytton Savings and Loan Association, were present at this regular meeting of the Board of Directors of Beverly Hills Federal Savings and Loan Association, and

WHEREAS, Richards Matthews, Jr. was not present at the reconvened meeting of the Board of Directors of Beverly Hills Federal Savings and Loan Association at 1:30 p.m. on March 14, 1961, and

WHEREAS, at said reconvened regular meeting of the Board of Directors the resignations of the five Board members were accepted at successive intervals during the meeting and four of the five resigning members of the Board of Directors proceeded to elect Beth Lytton as Chairman of the Board and a Director, Thomas W. Clarke as President, Managing Officer and Director and Samuel J. Sills as a Director,—two of these resigning directors who participated in the election being Eugene Webb, Jr. and Marguerite R. Webb, interested parties to this entire transaction which would redound to their benefit and to the benefit of a trust or trusts in which their children were the beneficiaries, and

WHEREAS, at said reconvened regular meeting, Glenn Wilson, a Director of Lytton Financial Corporation, was elected Vice-President of the Association, and

WHEREAS, on or about this same date, the 14th day of March, 1961, as part of the consideration to Lytton Financial Corporation for the purchase of the Southland Company, the power of substitution, contained in all proxies of members of Beverly Hills Federal Savings and Loan Association, constituting and appointing Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Eugene Webb, III, and Robert G. Rufi, in the order named, proxy for and in the name, place and stead of the signing member, was, "for good and valuable consideration," exercised by substituting Bart Lytton, Beth Lytton, Samuel J. Sills and Thomas W.

Clarke for the individuals previously named, in the order named, and

WHEREAS, shortly after the change in directorate of Beverly Hills Federal Savings and Loan Association, Beverly Hills Federal purchased approximately 15.2 million dollars worth of loans, at a 3.4% premium, from Lytton Savings and Loan Association and simultaneously sold at par, approximately 15.8 million dollars worth of loans to Lytton Savings and Loan Association, which, it appears, were reversed by action of the Board of Directors of Beverly Hills Federal Savings and Loan Association on June 28, 1961 and by action of the Board of Directors of Lytton Savings and Loan Association on June 21, 1961, and

WHEREAS, after being advised by the Federal Home Loan Bank Board on June 15, 1961 of certain possible violations of law and regulations and serious questions, which were outlined in detail with respect thereto, the then purported Directors of Beverly Hills Federal Savings and Loan Association, Beth Lytton, Dr. Samuel J. Sills and Thomas W. Clarke met, its President, Thomas W. Clarke informing the Board of Directors that he had received this letter, addressed to him as President, from the Federal Home Loan Bank Board, which *in part* criticized the action of Beverly Hills Federal in selling to Lytton Savings certain loans and purchasing others from Lytton Savings in an approximate amount of 15 million dollars for each transaction, and although these loans were considered proper and advantageous to the Association by these Directors, a reversal of the transaction was ordered, but the contents of the remainder of this letter were neither discussed, considered nor expressly acted upon by these Directors

nor was the seriousness of the other parts of this letter noted in the minutes of the meeting of the Directors of the Association nor was the said letter made a part of the minutes of the meeting of the Directors of the Association, and

WHEREAS, less than four months after the assumption of purported directorship by Thomas W. Clarke, previously cast solely in the role of an Attorney rather than an administrator for the Lytton interests, by Beth Lytton, wife of Bart Lytton, Chairman of the Board of Lytton Financial Corporation and Dr. Samuel J. Sills, a former Director of Lytton Savings and Loan Association, Thomas W. Clarke returned to his professional role and approximately one month later, Beth Lytton was replaced by her spouse, Bart Lytton, completing the management take-over by Bart Lytton, President and Chairman of the Board of Lytton Financial Corporation, of Beverly Hills Federal Savings and Loan Association, although he had stated earlier that he would take no position or directorship with Beverly Hills Federal Savings and Loan Association, other than holding the first proxy position, because he "would not take advantage of a corporate opportunity that would be adverse to the Lytton Financial Corporation," and

WHEREAS, at the Meeting of Shareholders, held on Wednesday, January 17, 1962 at 8:30 o'clock a.m. at the offices of the Association at 9424 Wilshire Boulevard, Beverly Hills, California, the President of Beverly Hills Federal, Harold P. Braman, prior to the election of directors, read the "President's Report" to the shareholders, which, while detailing the "fine Year" had by the Association and the current and projected

growth of the Association, as well as the status of "one of the top leaders of the saving and loan business nationally" who, with his wife, had assumed "operating control" of the Association, failed to mention and discuss the Board's letter of June 15, 1961, advising the Association of certain violations of law and regulations and serious questions which were outlined in detail with respect thereto, and

WHEREAS, at the aforesaid Meeting of Shareholders, Bart Lytton voted 471,458 votes for each of the nominees for the offices of Directors of the Association, said votes resulting from 18,146 proxies held by Bart Lytton under power of substitution from Eugene Webb, Jr.

WHEREAS, as a result of the foregoing, Beverly Hills Federal Savings and Loan Association and its past and purported present Officers and Directors and Lytton Financial Corporation and its Officers and Directors have violated the rules and regulations of this Board, specifically § 544.5 of the Regulations and Section 4 of the By-Laws of Beverly Hills Federal Savings and Loan Association, and other law respectively as follows:

(a) Eugene Webb, Jr. and Marguerite R. Webb have violated their fiduciary responsibilities to the shareholders of Beverly Hills Federal Savings and Loan Association by making a special and secret profit and consideration in return for their transfer of the proxies of the shareholders to Bart Lytton, Beth Lytton, Samuel J. Sills and Thomas W. Clarke, in which action the other current members of the then Board of Directors joined;

(b) Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones have violated their fiduciary responsibilities of loyalty and good faith to the shareholders of Beverly Hills Federal Savings and Loan Association by participating in the furtherance and accomplishment of an agreement by certain directors to elect and maintain designated persons in office as Officers and Directors of said Association, which was against public policy and accordingly void, and all said participating directors acted with the knowledge of said unlawful agreement;

(c) The Board of Directors of Beverly Hills Federal Savings and Loan Association, which attempted to elect new Directors on March 14, 1961, acted illegally and in violation of the Regulations of the Federal Home Loan Bank Board in that there was not a quorum present to fill vacancies on the Board of Directors, since Richards Matthews, Jr. was not present at this reconvened meeting and since Eugene Webb, Jr. and Marguerite R. Webb could not participate, by law, since they were interested parties;

(d) The proxy holders of Beverly Hills Federal, who were originally Eugene Webb, Jr., Marguerite R. Webb, Robert G. Rufi, Eugene Webb, III and Richards Matthews, Jr., violated the law when they respectively transferred their proxies for a consideration;

(e) Bart Lytton, Beth Lytton, Thomas W. Clarke and the Board of Directors of Lytton Financial Corporation are equally at fault for the violation of law and the regulations of this Board in the reconstitution of the Board of Directors of Beverly Hills Federal Savings and Loan Association, the purchasing of directorships and the sale of proxies, with the Webbs and the

former Board of Directors of Beverly Hills Federal Savings and Loan Association, since they participated in and encouraged these respective transactions;

(f) The current Board of Directors of Beverly Hills Federal Savings and Loan Association have not been properly elected for the reasons hereinbefore described.

RESOLVED That pursuant to and under authority of Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C.A. § 1464(d)(1), notice is hereby given to Beverly Hills Federal Savings and Loan Association, its Directors as of March 13, 1961, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, and its Directors since March 14, 1961, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H. P. Braman and Glenn Wilson, and to Lytton Financial Corporation of the foregoing violations of law and the regulations of the Federal Home Loan Bank Board.

RESOLVED FURTHER That the Beverly Hills Federal Savings and Loan Association, its Directors as of March 13, 1961, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, and its Directors since March 14, 1961, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H. P. Braman and Glenn Wilson, and Lytton Financial Corporation, its Officers and Directors, are hereby given thirty (30) days from the date of receipt of this Resolution within which to correct these violations of the law and the regulations of the Federal Home Loan Bank Board and to perform the legal duties concomitant with the correction of such violations of law and the regulations of this Board.

RESOLVED FURTHER That an authenticated copy of this resolution be personally served forthwith on Beverly Hills Federal Savings and Loan Association, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi, Eugene C. Jones, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H. P. Braman, Glenn Wilson and Lytton Financial Corporation or in lieu thereof that an authenticated copy be sent forthwith by registered mail to said parties at their last known addresses as they appear on the records of the Board.

I, Harry W. Caulsen do hereby certify that I am Secretary to the Federal Home Loan Bank Board, and do further certify that the foregoing is a true and correct copy of a resolution adopted by the Federal Home Bank Board at a meeting of said Board held at Washington, D. C. on the 26th day of January, 1962.

Witness my hand and the seal of said Board this 26th day of January, 1962.

Harry W. Caulsen
Secretary

APPENDIX "B."

FEDERAL HOME LOAN BANK BOARD

No. 15,450

Date: January 29, 1962

RESOLVED, That pursuant to Part 509 of the General Regulations of the Federal Home Loan Bank Board, Oran M. Gentry, Los Angeles, California, be and he hereby is, designated to make service of Federal Home Loan Bank Board Resolution No. 15,430, dated January 26, 1962 on Beverly Hills Federal Savings and Loan Association, Beverly Hills, California, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Ruffi, Eugene C. Jones, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H.P. Braman, Glenn Wilson and Lytton Financial Corporation, Hollywood, California.

By the Federal Home Loan Bank Board
Harry W. Caulsen
Secretary

Nos. 21957, 22404

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFF and
EUGENE C. JONES,

Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

BRIEF OF RESPONDENT TITLE INSURANCE & TRUST COMPANY.

PAUL, HASTINGS, JANOFSKY &
WALKER,

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MAY 21 1968

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Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

BRIEF OF RESPONDENT TITLE INSURANCE & TRUST COMPANY.

Statutes Involved.

Appellant claims that the United States District Court has jurisdiction of the subject matter of the claims in question based on one or more of the following federal statutes:

1. Jurisdiction of Actions Involving Controversies With Respect to Notices of Violation of Law Given by the Federal Home Loan Bank Board.

12 U.S.C.A. 1464(d)(1):

“ . . . Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. . . .”

2. Jurisdiction of Actions Commenced by the Federal Home Loan Bank Board and of Cross Claims in Such Actions.

28 U.S.C.A. 1345:

“Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.”

12 U.S.C.A. 1437(b):

“The Home Loan Bank Board which was, pursuant to Reorganization Plan Numbered 3 of 1947, established and made a constituent agency of the Housing and Home Finance Agency shall, from August 11, 1955, cease to be such constituent agency and shall be an independent agency (including the Federal Savings and Loan Insurance Corporation) in the executive branch of the Government: . . . The name of the Home Loan Bank Board is changed to ‘Federal Home Loan Bank Board’.”

12 U.S.C.A. 1464(d)(1):

“ . . . The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. . . .”

Rule 13(g), Federal Rules of Civil Procedure:

“A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.”

Statement of the Case.

Title Insurance & Trust Company, Appellee herein, first became a party to this action through service of a Second Amended and Supplemental Complaint on May 14, 1965. The action was previously filed by Beverly Hills Federal Savings & Loan Association against all other parties in March of 1962. The suit involved claims and cross-claims against and by the Federal Home Loan Bank Board, and had involved lengthy discovery proceedings prior to the service of said Second Amended and Supplemental Complaint on Title Insurance & Trust Company.

The Second Amended and Supplemental Complaint herein alleges in Paragraph 9 thereof that Title Insurance & Trust Company was one of three trustees of

an irrevocable trust created by defendants Eugene Webb, Jr. and Marguerite R. Webb for the benefit of their children. Said trust held as one of its assets all of the outstanding stock of the Southland Company. Paragraph 19 of said Second Amended and Supplemental Complaint alleges that in 1961 while Title Insurance & Trust Company was one of the co-trustees of said trust the stock in the Southland Company was sold to Lytton Financial Corporation by the remaining co-trustees although Title Insurance & Trust Company did not execute any of the documents pertaining to the transfer of said stock, nor was its consent to the transaction sought. Said paragraph further alleges that under the terms of the trust agreement the consent and approval of defendants Eugene Webb, Jr. and Marguerite R. Webb was sufficient to transfer the stock of the Southland Company to Lytton Financial Corporation without the assent of Title Insurance & Trust Company. Said paragraph 19 further alleged that it was not asserted by plaintiff that defendant Title Insurance & Trust Company acted in violation of any law, regulation or by-law but was made a defendant for the sole purpose of facilitating the enforcement of any orders that might be made by the Court with respect to the trust or the trust property.

On May 5, 1967, defendant Title Insurance & Trust Company filed its Motion to Dismiss the Second Amended and Supplemental Complaint on two grounds: lack of jurisdiction over the subject matter and failure to state any claim against said defendant upon which relief could be granted. On August 14, 1967 the District Court entered its judgment of dismissal of defendant Title Insurance & Trust Company for lack of jurisdiction of the subject matter. Defendant Title In-

insurance & Trust Company's additional ground for dismissal for failure to state any claim upon which relief could be granted, not having been reached by the Court, was denied without prejudice to renewal at a later time.

On August 31, 1967, plaintiff Beverly Hills Federal Savings & Loan Association served on defendant Title Insurance & Trust Company a notice of appeal from said order of the District Court dismissing the action as to that defendant.

Summary of Argument.

1. 12 U.S.C.A. 1464(d)(1) does not confer jurisdiction on the District Court as to Beverly Hills Federal Savings & Loan Association's action against Title Insurance & Trust Company as no notice of any violation of law, rule or regulation was at any time given by the Federal Home Loan Bank Board to Title Insurance & Trust Company.

2. The action against Title Insurance & Trust Company was commenced by Beverly Hills Federal Savings & Loan Association and not by the Federal Home Loan Bank Board. Thus, the contention of appellant that a prior cross claim of the Federal Home Loan Bank Board confers pendant jurisdiction on the District Court as to all parties to the Board's suit is not properly made as to Title Insurance & Trust Company as said Company was not a party to the prior action brought by the Federal Home Loan Bank Board. Therefore, the provisions of 28 U.S.C.A. 1345, 12 U.S.C.A. 1437(b), 12 U.S.C.A. 1464(d)(1) and Rule 13(g) Federal Rules of Civil Procedure do not confer on the District Court ancillary jurisdiction over Title Insurance & Trust Company.

ARGUMENT.

I.

The District Court Does Not Have Jurisdiction Over Appellant's Claim Against Title Insurance & Trust Company Under 12 U.S.C.A. 1464(d)(1).

12 U.S.C.A. 1464(d)(1) permits the Federal Home Loan Bank to bring a proceeding in a Federal District Court following notice of claim of alleged violation of law or regulation against the party over whom jurisdiction is sought. No notice of claim of violation of law or regulation is now or has been made against defendant Title Insurance & Trust Company by the Federal Home Loan Bank Board. No violation of law or regulation as required under 12 U.S.C.A. 1464(d)(1) is alleged or contended by Appellant to exist as to Title Insurance & Trust Company. The only statement in the Brief of Appellant as to the jurisdiction of the District Court as to Title Insurance & Trust Company is a reference to the fact that the Court granted the motion to dismiss for lack of jurisdiction of Title Insurance & Trust Company [p. 17] and that a meeting of the Board of Directors of the Southland Company and a recessed meeting of the Board of Directors of Beverly Hills Federal Savings & Loan Association were held on a certain day at Title Insurance & Trust Company in Los Angeles [p. 17].

As stated by Appellant at page 21 of its Brief the only controversy, and only claim upon which jurisdiction is based under 12 U.S.C.A. 1464(d)(1) relates to whether or not the defendants referred to in the Brief of Appellant as the "Webb" group must account to Beverly Hills Federal Savings & Loan Association for secret profit realized in their dealings with Beverly

Hills Federal Savings & Loan Association and the Southland Company. No contention is made by any party of any controversy as to Title Insurance & Trust Company. Appellant's claim against Title Insurance & Trust Company, if such can be denoted a claim, being wholly independent of any claim by appellant against the Federal Home Loan Bank Board or of the claim of the Federal Home Loan Bank Board against Appellant or the "Webb Group" of defendants this action was properly dismissed as to Title Insurance & Trust Company by the District Court for lack of jurisdiction. *Hurn v. Oursler*, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933).

II.

The District Court Does Not Have Jurisdiction or Ancillary Jurisdiction Over Appellant's Claim Against Title Insurance & Trust Company as a Cross Claim.

28 U.S.C.A. 1345 does not provide a basis of jurisdiction in the District Court for Appellant's action against Title Insurance & Trust Company. No relief has been sought by the Federal Home Loan Bank Board as to Title Insurance & Trust Company by its answer or cross claim so as to confer original jurisdiction in the District Court below. No original jurisdiction having been created by the Board's action, no ancillary jurisdiction can be said to exist so as to permit the District Court to entertain Beverly Hills Federal Savings & Loan Association's claim asserted against Title Insurance & Trust Company. Dismissal of the action of Beverly Hills Federal Savings & Loan Association as to Title Insurance & Trust Company was proper by the District Court.

Conclusion.

There being no claim of diversity jurisdiction in this action and no contention of a violation of any federal statute, rule or regulation, this action as to Title Insurance & Trust Company was properly dismissed by the District Court and such action should be affirmed on appeal.

Respectfully submitted,

PAUL, HASTINGS, JANOFSKY &
WALKER,

LEE G. PAUL,

ROBERT G. LANE,

*Attorneys for Appellee, Title
Insurance & Trust Co.*

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT G. LANE

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUF and
EUGENE C. JONES,

Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

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vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

Brief of Appellees Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones.

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BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

Brief of Appellees Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones.

Issue Presented for Review.

1. Was the Judgment of the District Court dismissing for lack of jurisdiction, the action upon the Second Amended and Supplemental Complaint against the appellees, correct?

Statement of the Case.

Appellant's Opening Brief recites as facts much that is not a proper part of the record on this appeal and

much that has no bearing upon the issue which is presented for review.¹

Rather than comment upon the improper and the irrelevant, we shall state the pleadings, the documents and the evidence upon which Judge Whelan properly concluded that jurisdiction is lacking.

This case began in 1962 by the filing of a Complaint by the Beverly Hills Federal Savings and Loan Association against the Federal Home Loan Bank Board. The Association asserted that the Board had incorrectly charged the Association with improper acts and practices; the Association asked that the District Court, pursuant to 12 U.S.C.A. 1464(d)(1), declare that the Association, its officers and directors had not acted wrongfully.

The Complaint was superseded by a First Amended Complaint, also filed in 1962, and later, in 1965, by a Second Amended and Supplemental Complaint. It, together with its Exhibits, is reproduced as Appendix "A" to this Brief, and we will refer to it by reference to that Appendix. Because the Second Amended and Supplemental Complaint completely supersedes the earlier charges, we shall refer only to it.

Judge Whelan, in the District Court, held that the Second Amended and Supplemental Complaint did not

¹Between pages 6 and 17 Appellant's Opening Brief is a lengthy discussion of matters contained in the depositions of Eugene Webb, Norman Kull, Bart Lytton and Thomas Clarke. There was never introduced at the hearing, and there is therefore no basis in this Court to recite the deposition testimony which comprises the large majority of Appellant's Opening Brief.

The issue before Judge Whelan in the trial court was framed by the pleadings before him and upon evidence produced during the course of the hearing.

substantially assert jurisdiction against the appellees, and he dismissed it as against them.²

The Second Amended and Supplemental Complaint was filed May 10, 1965 [C.T. 750, Appendix "A"]. It alleged jurisdiction under §§1464 and 1464(d)(1) of 12 U.S.C.A. The gist of it and the claim of the plaintiff it asserts is not a grievance against the Bank Board. Paragraph 4 (Appdx A-2) alleges that the Bank Board is an independent agency of the executive branch of the United States Government; and that it is subject to suit in the Federal District Court. Paragraphs 6 and 7 (Appdx A-2) make the allegation that during the time prior to March 14, 1961, defendants Eugene Webb, Jr. and Marguerite R. Webb had the control of the Association; that they together with appellees Matthews, Rufi and Jones were the directors of the Association.

Paragraphs 8 and 9 (Appdx A-2-3) allege that at sometime prior to March 14, 1961, Southland Company was formed; that it engaged in mortgage, insurance, and escrow business for which the Association was the major source of business; that the stock ownership of Southland Company was in a trust for the

²Although this Court has had the case before it on two previous occasions, neither involved the issue, the pleadings nor the facts which are fundamental to this appeal. In *Reich v. Webb* (9th Cir. 1964) 336 F. 2d 153, this Court affirmed the denial of a savings account depositor of the Association to intervene. The issues related to adequacy or representation under Rule 24 of FRCP. In *Webb v. Beverly Hills Federal Savings and Loan Association* (9th Cir. 1966) 364 F. 2d 146, this Court affirmed the refusal to dismiss the Webb Group because the other alleged wrongdoers had been voluntarily dismissed by the Association and by the Bank Board. Both of these appeals predate the filing of the Second Amended and Supplemental Complaint which is the foundation of the Judgment of Dismissal which Appellant seeks to reverse.

benefit of the children of Mr. and Mrs. Webb, and of which they and Title Insurance and Trust Company (appellee in consolidated appeal 22404) were the trustees.

About March 14, 1961, according to paragraph 10, Mr. and Mrs. Webb sold the "control" of the Association to Lytton Financial Corporation for \$1,800,000. It alleges that the sale involved the transfer of the Southland Company stock to Lytton Financial for a stated price of \$1,500,000 and the execution of an employment agreement by which Lytton Financial was to pay Mr. and Mrs. Webb \$300,000. It is claimed by the Association (Appdx A-4-5) that the sole purpose of the transaction was to transfer control of the Association to Lytton Financial. The sale, according to the allegations, required Mr. and Mrs. Webb to do what was necessary to maintain the business relationship between the Association and Southland Company. Concurrently with the sale, Mr. and Mrs. Webb, Mr. Matthews, Mr. Rufi and Dr. Jones (referred to collectively in pleadings and briefs as the "Webb Group") resigned as directors of the Association, and were replaced by persons selected by Lytton Financial. Paragraph 10 concludes that this transaction was a subterfuge for the sale of the control of the Association.

Paragraph 12 (Appdx A-5) alleges that the transaction was a violation of law, of the Board's rules and regulations, and the Association's By-laws—which ones it does not say.

Paragraphs 15 and 16 (Appdx A-6) state that the Board, in January and March of 1962, adopted resolutions that the transaction violated its rules and advised the Association and the Webb Group that it, the

Board, would conduct a hearing and take action to correct the claimed improprieties. The Association, according to paragraph 17 (Appdx A-7) brought the action in the District Court to obtain declaratory relief that the transaction was valid and proper.³

The allegations then state that in early 1965 the Association and the Board attempted to correct the claimed violations and entered into a written agreement by which the Association purchased, for \$1,500,000 from Lytton Financial its stock in the Southland Company, and the Lytton group of directors resigned in favor of a "public interest" board of directors. The action was then dismissed against Lytton Financial and the entire Lytton group, in accordance with the terms of the agreement that had been made.⁴

Paragraph 22 (Appdx A-8) alleges the nature of the controversy which plaintiff contends exists and concerning which it seeks declaratory relief and compensatory damages from the Webb Group of \$1,800,000. Paragraph 22 reads as follows:

"A bona fide controversy exists between the plaintiff ASSOCIATION and defendants with respect to the remainder of the violations and charges specified in Exhibits 'A' and 'B'. Plaintiff contends that the sale of control of plaintiff ASSOCIATION is in violation of the law and the Rules and Regulations of the BOARD and the By-Laws of plaintiff ASSOCIATION, and that de-

³To this point the allegations show that in 1962 a true dispute between the Association and the Board existed. The jurisdiction to file the original Complaint under 12 U.S.C.A. 1264 (d)(1) was clear because a true controversy existed.

⁴Clear on the face of the pleadings is that the controversy between the Association and the Board has dissolved; a settlement has been made. Jurisdiction, say we, and said Judge Whelan has gone.

fendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFİ and EUGENE C. JONES are jointly and severally liable to plaintiff ASSOCIATION for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000) held in trust for plaintiff ASSOCIATION. Plaintiff ASSOCIATION is informed, believes and alleges that the BOARD concurs in this contention of plaintiff ASSOCIATION, but makes additional and further contentions with respect to the violations alleged in Exhibit 'A' and 'B'. Defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFİ and EUGENE C. JONES contend that the sale was valid and lawful, that they did not violate the law or the Rules and Regulations of the BOARD or the By-Laws of plaintiff ASSOCIATION, and that they are not liable for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000), or any other amount."

The Second Amended and Supplemental Complaint prays judgment for declaratory relief that the sale was in violation of the rules and regulations of the Board and of the By-laws of the Association and asks the Court to determine that the sum of \$1,800,000 is held in trust for the Association. It also asks judgment in the amount of \$1,800,000 against each of the individuals in the Webb Group.

No relief is sought against the Federal Home Loan Bank Board and no dispute with the Federal Home Loan Bank Board is in any manner alleged in the Second Amended and Supplemental Complaint.

The Answer by the Bank Board (Appdx B-43) is equally illuminating on the question of whether or not a dispute between the Association and the Bank Board exists. It was filed November 23, 1966. It admits all the charging allegations in the Second Amended and Supplemental Complaint. When, however, the allegations of paragraph 22 are met, the Answer of the Bank Board states: (Appdx B-52)

“22 The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 22 of the complaint but more affirmatively avers that there are other extant controversies which are evident from a comparison of the Second Amended and Supplemental Complaint of the plaintiff, Association with the currently outstanding Cross-Claims of the Defendant, Federal Home Loan Bank Board as to the Defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, as well as this pleading of the Defendant, Federal Home Loan Bank Board, a regulatory agency charged with the supervision of federally-chartered Savings and Loan Associations, which is asserting broader and more extensive claims than the plaintiff, Association whose claims from an examination of the Second Amended and Supplemental Complaint are of a more narrow scope by virtue of its status as a thrift institution rather than a regulatory agency, with the exception that the Defendant, Federal Home Loan Bank Board has not asserted claims for punitive or compensatory damage against the defendants, Richards Matthews, Jr., Robert G. Rufi or Eugene C. Jones.”

The prayer in the Answer also makes it abundantly clear that the relief sought by the Bank Board is parallel to that sought by the Association. The Bank Board goes farther than the Association to the extent of asking that the Webb Group never again be given any position of responsibility or trust or management of the Association, and that the Court enter a judgment for punitive damages against Mr. and Mrs. Webb for violation of their fiduciary duties but in an amount not specified even in the prayer of the Complaint.⁵

The Webb Group in late 1955 filed a Motion to Dismiss the Second Amended and Supplemental Complaint for lack of federal jurisdiction. After extensive briefing argument, Judge Whelan ordered a hearing and trial on the jurisdictional issue. Evidence and testimony was produced upon which he concluded that no controversy existed between the Association and the Board. Judge Whelan filed a Memorandum Decision and Opinion, printed as Appendix "C" to this brief, in which he said (Appdx C-57):

"The evidence here establishes that there is not any real controversy between plaintiff and the FEDERAL HOME LOAN BANK BOARD to give this Court Federal jurisdiction of plaintiff's action. While the plaintiff and the BOARD refer to some controversy, it is clear that such controversy is fanciful at the best."

⁵These latter two minor differences between the position of the Bank Board and the position of the Association are the differences which Judge Whelan characterized in his Memorandum Opinion as being "fanciful at the best" (Appdx C-57).

Judge Whelan's Memorandum Decision and Opinion rejects all plaintiff's claims of subject matter jurisdiction. It considers the claims of federal question jurisdiction, pendent jurisdiction, ancillary jurisdiction and the doctrine of relation back. All are found wanting. As Appendix "C" demonstrates, all plaintiff's claims were given thorough consideration and scholarly attention. The Decision and the Judgment of Dismissal which followed were the result of mature and careful thought.

Summary of Argument.

The Memorandum Decision and Opinion by Judge Whelan contains a thorough review of the pertinent pleadings, the evidence on the jurisdictional question and the basis upon which he concluded there was no subject matter jurisdiction of the Second Amended and Supplemental Complaint against the Webb Group.

The Memorandum Opinion found no diversity of citizenship and no jurisdiction based upon the existence of a federal question. The Association in its Opening Brief does not now assert federal jurisdiction on either of these two bases.

What the Association now contends is that jurisdiction exists by reason of ancillary jurisdiction. It argues that because there is a dispute between the Association and the Bank Board, there is, therefore, jurisdiction for the Association to join a claim it has against the Webb Group. This argument before Judge Whelan was without success. He held a trial on the very is-

sue of whether or not a dispute existed between the Association and the Bank Board. Upon the conclusion of that trial, he found the contention of a controversy to be groundless. (Appdx C-57)

The determination by Judge Whelan that no controversy existed between the Association and the Bank Board upon the Second Amended and Supplemental Complaint was based upon his analysis of the Second Amended and Supplemental Complaint and the position taken by the Bank Board. He concluded that the Association and the Bank Board were, in effect, taking a completely parallel, if not identical, position. Only in two narrow areas was there even a suggestion of difference between them. (Appdx C-57-58). One was that the Bank Board was contending that the Association should never again employ any members of the Webb Group, when, of course, the evidence showed at the hearing that neither the new management of the Association nor any one connected with the Webb Group had any intention whatsoever in the foreseeable future that the Webb Group would ever be asked to be employed by the Association in any capacity. Judge Whelan found that there was no substantial controversy between the Association and the Bank Board on this score.

The second area where it was contended that a difference of opinion between the Bank Board and the Association existed was in reference to punitive damages. The Second Amended and Supplemental Complaint did not seek punitive damages from the Webb Group; the

Bank Board's answer said the Webb Group should be liable for punitive damages. Judge Whelan found, on the evidence produced at the hearing, that this was not the kind of controversy which justified the exercise of federal jurisdiction. Upon these contentions, this evidence and a full and complete hearing, Judge Whelan concluded there was no real controversy between the Bank Board and the Association which would invoke federal jurisdiction.

Appellant's Opening Brief does not question the finding that there is no real controversy between the Association and the Bank Board. The Association does not question the sufficiency of the evidence, nor does it assert that there is, in reality, a controversy between it and the Bank Board.

ARGUMENT.

I.

The Second Amended and Supplemental Complaint Asserts No Claim Arising Under the Constitution or Laws of the United States.

The Second Amended and Supplemental Complaint does not allege as a basis of jurisdiction the existence of a federal question under 28 U.S.C.A. Section 1331. The crux of the Association's claim against the Webb Group is a violation of common law and California duties and responsibilities of officers and directors. Although federal question jurisdiction was asserted by the Association in the District Court, it was expressly rejected by Judge Whelan and is not urged by the Association in its Opening Brief.

II.

The Doctrine of Pendent Jurisdiction Is Not Applicable.

The doctrine of pendent jurisdiction set forth in the leading case of *Hurn v. Oursler*, 289 U.S. 238, 58 S.Ct. 586, 77 L.Ed. 1148 (1933), is not applicable to the Second Amended and Supplemental Complaint and was found by Judge Whelan in his Memorandum Opinion not to be applicable (Appdx C-57) The two prerequisites to the court obtaining jurisdiction over a claim not otherwise subject to the court's jurisdiction, but where joined with one over which the court has jurisdiction, are that it must be joined with a federal claim of substance and that the federal claim with which it is joined must be such as to constitute the two of them as, in effect, a single cause of action.

The short answer to any claim of pendent jurisdiction here is that the Association does not assert any federal claim to which a common law claim may append itself. The Second Amended and Supplemental Complaint asserts a single claim against the Webb Group, and that is a claim founded upon common law and California statutory obligations.

III.

The Doctrine of Ancillary Jurisdiction Does Not Apply.

At the outset of the case in 1962 the Association claimed that a dispute existed between it and the Bank Board and that this dispute was one over which the District Court had subject matter jurisdiction pursuant to 12 U.S.C.A. 1464(d)(1). It was correct. 12 U.S.C.A. 1464(d)(1) clearly provides for subject matter jurisdiction where the Board has asserted violations of law and regulation and the Association disputes the board's claim.⁶

⁶Section 1464(d)(1), before its amendment in 1966, read as follows:

"The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (2) of this

(This footnote is continued on the next page)

Throughout this statute, constant reference is made to the Bank Board and associations as adversaries. The

subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpoenas and subpoenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpoena or subpoena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided, either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Federal Home Loan Bank Board, Washington, District of Columbia."

entire section makes its purpose quite clear—the settlement of disputes between the Bank Board and the associations only. This intention is confirmed by the Historical Note to 12 U.S.C.A. 1464, which reads:

“Subsec. (d) amended generally by Act Aug 2, 1954, § 503(2), to provide a means by administrative and court proceedings whereby the Board may enforce compliance with law and regulations by Federal savings and loan associations . . .”

Nothing is said about suits by or against individuals. No case has been cited by the Association and none can be found in which individuals had sued, or been sued by, the Bank Board under Section 1464(d)(1).

The statutory remedy the Bank Board has for wrongful activities by association officers is in 12 U.S.C.A. 1464(d)(2). This section establishes grounds for appointing a conservator and after hearing.⁷

⁷It reads:

“The grounds for the appointment of a conservator or receiver for a Federal savings and loan association shall be one or more of the following: (i) insolvency in that the assets of such association are less than its obligations to its creditors and others, including its members; (ii) violation of law or of a regulation; (iii) the concealment of its books, records, or assets or the refusal to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Board; and (iv) unsafe or unsound operation. The Board shall have exclusive jurisdiction to appoint a Supervisory Representative in Charge, conservator, or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists and the Board determines that an emergency exists requiring immediate action, the Board is authorized to appoint ex parte and without notice a Supervisory Representative in Charge to take charge of said association and its affairs who shall have and exercise all the powers herein provided for conservators and receivers. Unless sooner removed by the Board, such Supervisory

(This footnote is continued on the next page)

If there existed a valid substantial dispute between the Association and the Bank Board, there might be some validity in an assertion that either the Association or the Bank Board could join other parties necessary for a complete determination of the dispute or a

Representative in Charge shall hold office until a conservator or receiver, appointed by the Board after notice as herein provided, takes charge of the association and its affairs, or for six months, or until thirty days after the termination of the administrative hearing and final proceedings herein provided, or until sixty days after the final termination of any litigation affecting such temporary appointment, whichever is longest. The Board shall have the power to appoint a conservator or receiver but no such appointment of a conservator or receiver shall be made except pursuant to a formal resolution of the Board stating the grounds therefor and except notice thereof is given to said association stating the grounds therefor and until an opportunity for an administrative hearing thereon is afforded to said association. Such hearing shall be held in accordance with the provisions of the Administrative Procedure Act and shall be subject to review as therein provided and the review by the court shall be upon the weight of the evidence. A conservator shall have all the powers of the members, the directors, and officers of the Federal association and shall be authorized to operate it in its own name or conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for any Federal savings and loan association, which shall have power as receiver to buy at its own sale subject to approval by the Board. With the consent of the association expressed by a resolution of the board of directors or of its members, the Board is authorized to appoint a conservator or receiver for a Federal association without notice and without hearing. The Board shall have power to make rules and regulations for the reorganization, merger, and liquidation of Federal associations and for such associations in conservatorship and receivership and for the conduct of conservatorships and receiverships. Whenever a Supervisory Representative in Charge, conservator, or receiver, appointed by the Board pursuant to the provisions of this section, demands possession of the property, business and assets of any association, the refusal of any officer, agent, employee, or director of such association to comply with the demand shall be punishable by a fine of not more than \$1,000 or by imprisonment for not more than one year or both by such fine and imprisonment."

complete and effective granting of relief. But, as the pleadings before Judge Whelan at the hearing showed, there was no real dispute between the Association and the Bank Board. The dispute which once existed and had been specified in the original complaint had vanished by the time of the Second Amended and Supplemental Complaint because of the settlement which had been reached between the Association and the Bank Board in early 1965. Judge Whelan specifically found that there was no real controversy. Absent such a controversy, it necessarily follows that there was no federal jurisdiction asserted in the Second Amended and Supplemental Complaint to which a claim against the Webb Group by the Association could be an ancillary claim.

Appellant argues (Brief, page 22) that once the Association and the Board have a difference on any matter, the Association, *ipso facto*, has jurisdiction to bring suit in the District Court against any party it claims to be involved in the dispute. That is certainly not what 1464 (d)(1) says; it is not reasonably inferred from the language in 1464 (d)(1). Quite to the contrary, 1464(d)(1) speaks only of disputes between the Association and the Bank Board. It provides in effect a "safety valve" for the Association. Rather than meet the Board's charges in a Board hearing, the Association can assert jurisdiction of an impartial tribunal to determine the validity of the Board's dispute with the Association.

IV.

The Bank Board's Cross-Claim Against the Webb Group Does Not Create Ancillary Jurisdiction for the Second Amended and Supplemental Complaint.

Having failed to establish federal jurisdiction by alleging a real dispute in its pleading, the Association now attempts to accomplish the same purpose by a reverse approach of using the Bank Board's Cross-claim against the Webb Group.

The Association makes the oblique argument (Opening Brief, pp. 26-27) that the Bank Board, as an agency of the United States, is expressly authorized to sue by an Act of Congress, 28 U.S.C.A. 1345, and that because of this fact the Association has ancillary jurisdiction to file a complaint against the Webb Group. The Second Amended and Supplemental Complaint does not predicate jurisdiction upon 28 U.S.C.A. 1345, and does not, therefore merit the requirement that the claimed basis for jurisdiction, as a matter of pleading, must appear on the complaint.

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (1936);

Pure Oil Co. v. Puritan Oil Co. (2nd Cir. 1942) 127 F.2d 6;

Barnhart v. Western Maryland Ry. Co. (4th Cir. 1942) 128 F.2d 709.

Whether the District Court has jurisdiction of the Bank Board's cross-claim against the Webb Group is not an issue in this appeal.⁸

⁸The cross-claim by the Bank Board against the Webb Group has been held by Judge Whelan to be jurisdictionally effective

The Court on this appeal is not required to determine whether the cross-claim by the Bank Board against the Webb Group asserts a matter over which the District Court has subject matter jurisdiction. This appeal should be denied regardless of whether or not the cross-claim stands on its own jurisdiction. Nevertheless, it is appropriate to call this Court's attention to the fact that the entire framework of 12 U.S.C.A. 1464 as it read in May, 1965, when the Second Amended and Supplemental Complaint was filed, is one which limits the Bank Board's activities for alleged violations of rules and regulations or of law to two remedies. One is the notice of violation procedure which the Bank Board followed in this case with an ultimate determination either in a hearing before the Bank Board or in the District Court. The other remedy available to the Bank Board was that provided in 12 U.S.C.A. 1464-(d)(2), establishing the grounds of the procedures for the appointment of a conservator or a receiver for the Association. No specific authority is given to the Bank Board to sue third parties, and no such authority can be reasonably inferred from any section of 12 U.S.C.A. 1464.

It is relevant in this connection that this Court consider the amendment to 12 U.S.C.A. 1464 enacted in 1966 as Public Law 89-695, Financial Institutions Supervisory Act of 1966. A third remedy was given to the Bank Board by this amendment, namely, the right of the Bank Board, under circumstances where direc-

and the motion by the Webb Group to dismiss it has been denied. Indeed, this Court may take judicial notice of its own files which show that an Application for Permission to Appeal from that ruling by Judge Whelan was denied on March 21, 1968. (File No. M-3777)

tors or officers of an association engage in practices resulting in substantial loss or damage to the association and evidencing a personal dishonesty and unfitness, on the part of the individual, after hearing, to remove or suspend such officer and director from acting for the association. Even this enlargement of the specified rights of the Bank Board does not include any right to take action against the officer or director by way of a civil suit against him. Senate Report No. 1482, 1966 U.S. Code Congressional and Administrative News 3532 shows that the Congress was concerned with the need to provide a procedure which would secure a prompt correction of irregular practices and unsafe operations of Associations. Certainly, if Congress had wished to provide for a direct cause of action by the Board against directors and against former directors, it would have done so in this amendment to Section 1464.

The Association's argument that its pleading as a plaintiff can borrow jurisdiction from a defendants' cross-claim against another defendant is not supported by any authority. The Association cites no authority for this bold proposition. There is, however, authority to the contrary; that the main action may not borrow jurisdiction from the cross-claim. When a contention similar to the Association's contention was raised in *Ferreira v. Sawayama-Kisen KK*, D.C. S.D.N.Y. 1959, 171 F. Supp. 96, Judge Dimock answered it thusly (171 F. Supp. 96 at 98):

"Here, however, it is the third party claim which has the requisite diversity of citizenship. There is no jurisdiction to entertain the plaintiff's action on the civil side. It is the handmaiden only who has the right to entry. The mistress who seeks en-

try cannot say that she is needed for the service of the handmaiden.

“The third party claim cannot confer upon the court jurisdiction over the claim asserted by the plaintiff.”

Other cases similarly holding that the jurisdictional basis asserted in a cross-claim cannot give subject matter jurisdiction to an otherwise deficient complaint are:

Burlingham, Underwood, Barron, Etc. v. Luckenbach S.S. Co., in D.C. S.D.N.Y., 1962, 208 F. Supp. 544;

Massella v. Pan Oceanica A/S Panama, D.C. S.C.N.Y. 1964, 232 F. Supp. 29.

See also:

6 Cyc. Fed. Proc. (3rd Ed.) Section 17.71.

That the Bank Board may have jurisdiction under 28 U.S.C.A. 1345 when it filed its cross-complaint does not create jurisdiction of the Court over the complaint of the Association under 28 U.S.C.A. 1345. *Acron Investments, Inc. v. Federal Savings & Loan Insurance Corp.* (9th Cir. 1966) 263 F.2d 236, cited by the Association (Brief, p. 26), neither stands for that proposition nor supports that proposition by inference. *Acron Investments* was an action in which the Federal Savings & Loan Insurance Corporation brought suit to foreclose upon deeds of trust. That corporation was an agency of the United States authorized by Act of Congress to bring suit. The fact that it was bringing suit upon an assigned deed of trust does not support any assertion that the assignor could have brought suit; yet, that appears to be the argument which the Association makes.

Finally, appellant's claim that 28 U.S.C.A. 1345 should be given a broad construction so that it reads, in effect, that the court has jurisdiction over any pleading where the United States or its agencies are involved finds no support in any case and is certainly contrary to the language itself of 28 U.S.C.A. 1345. This argument by appellant at page 28 of its brief has no merit.

Conclusion.

The Association's claim of subject matter jurisdiction against the Webb Group is based in part upon the contention that 12 U.S.C.A. 1464(d)(1) confers federal jurisdiction. As we have shown in this Brief, such jurisdiction is completely dependent upon the existence of a genuine controversy between the Association and the Bank Board. No such controversy existed at the time of the filing of the Second Amended and Supplemental Complaint. No such controversy was alleged in that pleading. It follows, therefore, that jurisdiction does not exist under that statute.

The Association also contends that the District Court has jurisdiction of the Bank Board's cross-claim against the Webb Group and that, therefore, ancillary jurisdiction exists as to the Association's Second Amended and Supplemental Complaint. No authority is cited for this proposition and it puts the cart before the horse. The Bank Board may or may not have jurisdiction to bring an action against former directors of a savings and loan association; but whether it does or does not have that jurisdictional power, it cannot give jurisdiction to a Complaint which otherwise has no jurisdictional foundation and to which the cross-claim becomes in effect, a responsive pleading.

For the reasons set forth in this Brief, the Judgment of Dismissal of the Second and Supplemental Complaint against the Webb Group should be affirmed.

Respectfully submitted,

POLLOCK AND PALMER,

JOHN P. POLLOCK,

*Attorneys for Appellees, Eugene Webb,
Jr., Marguerite R. Webb, Richards
Matthews, Jr., Robert G. Rufi and
Eugene C. Jones.*

APPENDIX "A."

Second Amended and Supplemental Complaint for Declaratory Judgment, to Impress a Trust, and Other Relief.

United States District Court, for the Southern
District of California, Central Division.

Beverly Hills Federal Savings and Loan Association,
Plaintiff, v. Federal Home Loan Bank Board, Eugene
Webb, Jr., Marguerite R. Webb, Richards Matthews,
Jr., Robert G. Rufi, Eugene C. Jones, and Title Insur-
ance and Trust Company, Defendants. Civil Action No.
62-305-FW

Lodged: March 15, 1965.

Filed: May 10, 1965.

1. This action arises under the Home Owners' Loan Act of 1933, as amended (12 U.S.C. §1464 and §1464[d][1]) and the Federal Declaratory Judgments Act (28 U.S.C. §2201 and §2202).

2. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars (\$10,000).

3. Plaintiff is a federal savings and loan association organized and existing under the Home Owners' Loan Act, as amended, with its home office in Beverly Hills, California.

4. Defendant FEDERAL HOME LOAN BANK BOARD, referred to as the BOARD, is an independent agency of the executive branch of the United

States Government. The BOARD is subject to suit in the Federal District Court in which the plaintiff ASSOCIATION has its main office, under Section 5(d)(1) of the Home Owners' Loan Act, as amended.

5. Defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES, and each of them, are residents of the Southern District of California. Defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB are sued individually and as trustees.

6. For a long time prior to and on March 14, 1961, defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB were in control of plaintiff ASSOCIATION by virtue of proxy agreements executed by members of plaintiff ASSOCIATION designating the following persons, in the order named, to act for them: EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., EUGENE WEBB, III, and ROBERT G. RUFI, each having as to himself or herself full power of substitution.

7. For a long time prior to and on March 14, 1961, defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES constituted the Board of Directors of plaintiff ASSOCIATION. Defendant EUGENE WEBB, JR., was the president of plaintiff ASSOCIATION. Defendant MARGUERITE R. WEBB was the Chairman of the Board and first vice president of plaintiff ASSOCIATION.

8. For a long time prior to and on March 14, 1961, the Southland Company was a corporation organized

under the laws of California and engaged in the mortgage, insurance, escrow and related business. Its office was and is located in the same building as plaintiff's home office. Plaintiff ASSOCIATION was the major source of business for the Southland Company and referred mortgage, insurance, escrow and other business to the Southland Company from which the Southland Company made a profit. The Southland Company would have earned only nominal profits and the stock of the Southland Company would have had only nominal value if plaintiff ASSOCIATION had not referred business to the Southland Company.

9. Plaintiff is informed, believes and alleges that for a long time prior to and on March 14, 1961, defendants EUGENE WEBB, JR., MARGUERITE R. WEBB and TITLE INSURANCE AND TRUST COMPANY, as trustees for the children of EUGENE WEBB, JR., and MARGUERITE R. WEBB, owned the outstanding stock of the Southland Company. Defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB were on control of the trust and the Southland Company. Defendant EUGENE WEBB, JR., was a director and the general manager and president of the Southland Company. Defendant MARGUERITE R. WEBB was a director and vice president of the Southland Company.

10. On or about March 14, 1961, defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB sold control of plaintiff ASSOCIATION to Lytton Financial Corporation and its nominees for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000). The sale was accomplished through the trans-

fer of the stock of the Southland Company to the Lytton Financial Corporation and the execution of an employment agreement between the Lytton Financial Corporation and defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB. The parties to the sale arbitrarily allocated One Million Five Hundred Thousand Dollars (\$1,500,000) to the transfer of stock of the Southland Company and Three Hundred Thousand Dollars (\$300,000) to the employment agreement, although the sole purpose of the transaction and payment of the consideration was to transfer control of plaintiff ASSOCIATION to Lytton Financial Corporation and its nominees. The terms of the sale required defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB to do all things necessary to assure the continuance of the business relationship between plaintiff ASSOCIATION and the Southland Company. Concurrently with the sale of the stock and the execution of the employment agreement, defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFİ and EUGENE C. JONES resigned as directors and officers of plaintiff ASSOCIATION; exercised the power of substitution contained in the proxy agreements by substituting Bart Lytton, Beth Lytton, Samuel J. Sills, Thomas W. Clarke, H. P. Braman and Glenn Wilson, nominees of Lytton Financial Corporation, as the holders of the proxies; and selected nominees of the Lytton Financial Corporation as directors and officers of plaintiff ASSOCIATION. The sale of the stock of the Southland Company, together with the employment agreement, was used by defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB

as an instrumentality device and subterfuge to sell control of plaintiff ASSOCIATION.

11. The control of plaintiff ASSOCIATION, including the proxy agreements executed by its members and directorships, was and is an asset of plaintiff ASSOCIATION and its members.

12. In entering into the sale transaction and the transfer of control of plaintiff ASSOCIATION, defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB violated the law, the Rules and Regulations of the BOARD and the By-Laws of plaintiff ASSOCIATION and breached their fiduciary duties of loyalty, good faith and fidelity to plaintiff ASSOCIATION and its members. Defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB hold the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000), received from the sale, in trust for plaintiff ASSOCIATION and its members.

13. Defendants RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES conspired with, aided and assisted defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB in the sale of control of plaintiff ASSOCIATION. In so assisting and cooperating, defendants RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES violated the law, the Rules and Regulations of the BOARD and the By-laws of plaintiff ASSOCIATION and breached their fiduciary duties of loyalty, good faith and fidelity to plaintiff ASSOCIATION and its members. Defendants RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES are jointly and severally

liable, with defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB, for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000) received by defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB.

14. From and after the 14th day of March, 1961, until the 14th day of January, 1965, plaintiff was under the control and domination of the Lytton Financial Corporation and Bart Lytton, Beth Lytton, Samuel J Sills, Thomas W. Clarke, H. P. Braman and Glenn Wilson, nominees of Lytton Financial Corporation.

15. On or about January 26, 1962, the BOARD made findings and adopted a resolution that the sale was in violation of the law, the Rules and Regulations of the BOARD and the By-Laws of plaintiff ASSOCIATION, and notified plaintiff ASSOCIATION, its Board of Directors, and defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFİ and EUGENE C. JONES that it had resolved to correct the violations. A copy of the resolution and written charges is attached as Exhibit "A".

16. On or about March 30, 1962, the BOARD further adopted a resolution and notified plaintiff ASSOCIATION, its Board of Directors and defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFİ and EUGENE C. JONES of the violations and that it intended to conduct a hearing and take action to correct the violations. A copy of the resolution and written charges is attached as Exhibit "B".

17. Acting under the control of the directors specified in Paragraph 14, plaintiff ASSOCIATION on February 20, 1962 filed this action in declaratory relief to have the court declare that the sale transaction was valid and to enjoin the BOARD from proceeding with its resolutions and written charges or from correcting the violations.

18. On or about January 14, 1965, plaintiff ASSOCIATION and the BOARD attempted to correct certain of the violations and charges contained in the resolutions of the BOARD. With the approval of the BOARD, plaintiff entered into a written agreement with Lytton Financial Corporation, Bart Lytton, Beth Lytton, Thomas W. Clarke, Samuel J. Sills, H. P. Braman and Glenn Wilson, the nominees of Lytton Financial Corporation resigned from the Board of Directors of plaintiff ASSOCIATION, a new public interest Board of Directors of plaintiff ASSOCIATION was elected, the proxy agreements were transferred to the BOARD, and plaintiff ASSOCIATION acquired the outstanding stock of the Southland Company. Pursuant to the agreement, the court ordered the dismissal of all claims against Lytton Financial Corporation, Bart Lytton, Beth Lytton, Thomas W. Clarke, Samuel J. Sills, H. P. Braman and Glenn Wilson. A copy of the agreement is attached as Exhibit "C".

19. Plaintiff is informed, believes and alleges as follows: defendant TITLE INSURANCE AND TRUST COMPANY is a corporation organized under the laws of the State of California with its home office in Los Angeles, California, and was and is one of the co-trustees of the trust referred to in this complaint. Defendant TITLE INSURANCE AND TRUST COM-

PANY did not execute any of the documents pertaining to the transfer of stock of the Southland Company to Lytton Financial Corporation. Under the terms of the trust, the consent and approval of defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB was sufficient to transfer the stock. Plaintiff does not allege that defendant TITLE INSURANCE AND TRUST COMPANY acted in violation of any law, regulation or by-law and is made a defendant for the sole purpose of facilitating the enforcement of any orders made by the court with respect to the trust or the trust property.

20. Acting under its newly elected public interest Board of Directors, plaintiff ASSOCIATION is attempting to correct other violations arising out of the sale by prosecuting this Amended and Supplemental Complaint to recover the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000) paid as consideration for the sale of control of plaintiff ASSOCIATION.

21. Acting under its newly elected public interest Board of Directors, plaintiff ASSOCIATION on January 18, 1965 reinstated the Reich Savings Account with all accrued earnings.

22. A bona fide controversy exists between the plaintiff ASSOCIATION and defendants with respect to the remainder of the violations and charges specified in Exhibits "A" and "B". Plaintiff contends that the sale of control of plaintiff ASSOCIATION is in violation of the law and the Rules and Regulations of the BOARD and by By-Laws of plaintiff ASSOCIATION, and that defendants EUGENE WEBB,

JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES are jointly and severally liable to plaintiff ASSOCIATION for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000) held in trust for plaintiff ASSOCIATION. Plaintiff ASSOCIATION is informed, believes and alleges that the BOARD concurs in this contention of plaintiff ASSOCIATION, but makes additional and further contentions with respect to the violations alleged in Exhibits "A" and "B". Defendants EUGENE WEBB, JR., and MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES contend that the sale was valid and lawful, that they did not violate the law or the Rules and Regulations of the BOARD or the By-Laws of plaintiff ASSOCIATION, and that they are not liable for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000), or any other amount.

WHEREFORE, plaintiff ASSOCIATION prays for judgment as follows:

- (1) For a declaratory judgment that the sale was in violation of the law and the Rules and Regulations of the BOARD and the By-Laws of plaintiff ASSOCIATION, and that the defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES hold in trust for plaintiff the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000) paid as consideration for the sale, or such other declaration as may be appropriate and proper.

- (2) For judgment against defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUFI and EUGENE C. JONES, jointly and severally, for the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000), or such other sums or sum as plaintiff may be entitled.
- (3) For its costs.
- (4) For such other and further relief as may be just.

BALL, HUNT AND HART

By JOSEPH A. BALL

Attorneys for Plaintiff

Verification.

State of California, County of Los Angeles—ss.

LEONARD M. SMITH, being first duly sworn, deposes and says:

I am a vice president of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, the above named plaintiff, and am authorized to make this verification for and on behalf of said ASSOCIATION; that I have read the foregoing Second Amended And Supplemental Complaint For Declaratory Judgment, To Impress A Trust, And Other Relief and know the contents thereof; that the same is true of my own knowledge, except as to those matters which are stated on information or belief, and as to those matters I believe it to be true.

LEONARD M. SMITH

Subscribed and sworn to me This 15th day of March, 1965.

/s/ Anne L. Pillsbury

ANNE L. PILLSBURY, Notary Public

State of California—Principal Office

Los Angeles County

My Commission Expires Dec. 6, 1968.

(Seal)

EXHIBIT "A."

FEDERAL HOME LOAN BANK BOARD

No. 15,430

Date: January 26, 1962

WHEREAS, Beverly Hills Federal Savings and Loan Association, Beverly Hills, California, Lytton Savings and Loan Association, Hollywood, California and Home Foundation Savings and Loan Association of Palo Alto, Palo Alto, California are institutions whose accounts are insured under Title IV of the National Housing Act, as amended, 12 U.S.C. §1724 *et seq.*, and

WHEREAS, Beverly Hills Federal Savings and Loan Association, Beverly Hills, California is a Federal Savings & Loan Association, chartered by the Federal Home Loan Bank Board under the provisions of Section 5(a) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464 (a) and subject to the Rules and Regulations of the Federal Home Loan Bank Board, and

WHEREAS, prior to and since the 9th day of March, 1961, Lytton Savings and Loan Association, Hollywood, California and Home Foundation Savings and Loan Association of Palo Alto, California are and have been owned and controlled by the Lytton Financial Corporation, a corporation organized under the laws of the State of Delaware, with its principal office in Hollywood, California, and

WHEREAS, prior to, and for some time on, the 14th day of March, 1961, the Beverly Hills Federal Savings and Loan Association, Beverly Hills, California, had a five-member Board of Directors, of which Board of

Directors, Eugene Webb, Jr. was President and a Director and Marguerite R. Webb was First Vice-President and Chairman of the Board of Directors, respectively, and Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones were the remaining members of said Board of Directors, and

WHEREAS, on or about the 9th day of March, 1961, Lytton Financial Corporation, acting by and through Thomas W. Clarke, its Senior Vice-President (and Attorney), entered into a "Buy and Sell Agreement" to purchase all of the outstanding capital stock of the Southland Company, a mortgage banking, escrow and insurance company from a trust or trusts controlled by Eugene Webb, Jr. and Marguerite R. Webb (with the third and corporate trustee being the Title Insurance and Trust Company, 433 South Spring Street, Los Angeles, California), for the benefit of their children, and in which "Buy and Sell Agreement" the consideration payable by the Buyer was \$1,500,000 in cash to the Trust and a Personal Service Agreement described hereinafter of Eugene Webb, Jr. and Marguerite R. Webb with a further consideration to them of \$300,000, payable in annual installments of \$60,000, and

WHEREAS, a pertinent paragraph of the aforesaid "Buy and Sell Agreement" of March 9, 1961 provided that Eugene Webb, Jr. and Marguerite R. Webb would do any and all things necessary and execute any and all necessary documents as Lytton Financial Corporation might require to assure the continuance of the present business relationship between the Southland Company and the Beverly Hills Federal Savings and Loan Association, and

WHEREAS, all warranties made by the "Sellers" in the aforesaid "Buy and Sell Agreement" were the warranties of Eugene Webb, Jr. and Marguerite R. Webb and the corporate trustee neither joined in these warranties nor executed the agreement as co-trustee of this trust for the benefit of the Webb children, and

WHEREAS, as a follow-up agreement to the "Buy and Sell Agreement" of March 9, 1961, a "Personal Service Agreement" was entered into on March 4, 1961 between Lytton Financial Corporation and Eugene Webb, Jr. and Marguerite R. Webb whereby Lytton Financial Corporation, identified in the "Personal Service Agreement" as the "Buyer", agreed to pay the sum of \$300,000 over a 5-year period to Eugene Webb, Jr. and Marguerite R. Webb, irrespective of whether either or both of said parties survive the period of the Agreement and are, in fact, able and do perform the services, and

WHEREAS, on or about the 14th day of March, 1961, a regular meeting of the Board of Directors of the Beverly Hills Federal Savings and Loan Association was held in the morning in the offices of the Association, which meeting was adjourned at 10:00 a.m. and reconvened for a further session at 1:30 p.m. at the offices of the Title Insurance and Trust Company, 433 South Spring Street, Los Angeles, California, and

WHEREAS, Bart Lytton, President, Chairman of the Board and a Director of Lytton Financial Corporation, Thomas W. Clarke, Vice-President, a Director and Counsel for Lytton Financial Corporation, Maurie Starrels, Secretary, Treasurer and a Director of Lytton Financial Corporation and Samuel J. Sills, a Director of Lytton Savings and Loan Association, were

present at this regular meeting of the Board of Directors of Beverly Hills Federal Savings and Loan Association, and

WHEREAS, Richards Matthews, Jr. was not present at the reconvened meeting of the Board of Directors of Beverly Hills Federal Savings and Loan Association at 1:30 p.m. on March 14, 1961, and

WHEREAS, at said reconvened regular meeting of the Board of Directors the resignations of the five Board members were accepted at successive intervals during the meeting and four of the five resigning members of the Board of Directors proceeded to elect Beth Lytton as Chairman of the Board and a Director, Thomas W. Clarke as President, Managing Officer and Director and Samuel J. Sills as a Director,—two of these resigning directors who participated in the election being Eugene Webb, Jr. and Marguerite R. Webb, interested parties to this entire transaction which would redound to their benefit and to the benefit of a trust or trusts in which their children were the beneficiaries, and

WHEREAS, at said reconvened regular meeting, Glenn Wilson, a Director of Lytton Financial Corporation, was selected Vice-President of the Association, and

WHEREAS, on or about this same date, the 14th day of March, 1961, as part of the consideration to Lytton Financial Corporation for the purchase of the Southland Company, the power of substitution, contained in all proxies of members of Beverly Hills Federal Savings and Loan Association, constituting and appointing Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Eugene Webb, III, and Robert G. Rufi, in the order named, proxy for and in the name, place and stead of the signing member, was, “for good

and valuable consideration," exercised by substituting Bart Lytton, Beth Lytton, Samuel J. Sills and Thomas W. Clarke for the individuals previously named, in the order named, and

WHEREAS, shortly after the change in directorate of Beverly Hills Federal Savings and Loan Association, Beverly Hills Federal purchased approximately 15.2 million dollars worth of loans, at a 3.4% premium, from Lytton Savings and Loan Association and simultaneously sold at par, approximately 15.8 million dollars worth of loans to Lytton Savings and Loan Association, which, it appears, were reversed by action of the Board of Directors of Beverly Hills Federal Savings and Loan Association on June 28, 1961 and by action of the Board of Directors of Lytton Savings and Loan Association on June 21, 1961, and

WHEREAS, after being advised by the Federal Home Loan Bank Board on June 15, 1961 of certain possible violations of law and regulations and serious questions, which were outlined in detail with respect thereto, the then purported Directors of Beverly Hills Federal Savings and Loan Association, Beth Lytton, Dr. Samuel J. Sills and Thomas W. Clarke met, its President, Thomas W. Clarke informing the Board of Directors that he had received this letter, addressed to him as President, from the Federal Home Loan Bank Board, which *in part* criticized the action of Beverly Hills Federal in selling to Lytton Savings certain loans and purchasing others from Lytton Savings in an approximate amount of 15 million dollars for each transaction, and although these loans were considered proper and advantageous to the Association by these Directors, a reversal of the transaction was ordered, but the contents of the remainder

of this letter were neither discussed, considered nor expressly acted upon by these Directors nor was the seriousness of the other parts of this letter noted in the minutes of the meeting of the Directors of the Association nor was the said letter made a part of the minutes of the meeting of the Directors of the Association, and WHEREAS, less than four months after the assumption of purported directorship by Thomas W. Clarke, previously cast solely in the role of an Attorney rather than an administrator for the Lytton interests, by Beth Lytton, wife of Bart Lytton, Chairman of the Board of Lytton Financial Corporation and Dr. Samuel J. Sills, a former Director of Lytton Savings and Loan Association, Thomas W. Clarke returned to his professional role and approximately one month later, Beth Lytton was replaced by her spouse, Bart Lytton, completing the management take-over by Bart Lytton, President and Chairman of the Board of Lytton Financial Corporation, of Beverly Hills Federal Savings and Loan Association, although he had stated earlier that he would take no position or directorship with Beverly Hills Federal Savings and Loan Association, other than holding the first proxy position, because he "would not take advantage of a corporate opportunity that would be adverse to the Lytton Financial Corporation," and

WHEREAS, at the Meeting of Shareholders, held on Wednesday, January 17, 1962 at 8:30 o'clock a.m. at the offices of the Association at 9424 Wilshire Boulevard, Beverly Hills, California, the President of Beverly Hills Federal, Harold P. Braman, prior to the election of directors, read the "President's Report" to the shareholders, which, while detailing the "fine Year" had by the Association and the current and projected

growth of the Association, as well as the statuts of "one of the top leaders of the savings and loan business nationally" who, with his wife, had assumed "operating control" of the Association, failed to mention and discuss the Board's Letter of June 15, 1961, advising the Association of certain violations of law and regulations and serious questions which were outlined in detail with respect thereto, and

WHEREAS, at the aforesaid Meeting of Shareholders, Bart Lytton voted 471,458 votes for each of the nominees for the offices of Directors of the Association, said votes resulting from 18,146 proxies held by Bart Lytton under power of substitution from Eugene Webb, Jr.

WHEREAS, as a result of the foregoing, Beverly Hills Federal Savings and Loan Association and its past and purported present Officers and Directors and Lytton Financial Corporation and its Officers and Directors have violated the rules and regulations of this Board, specifically § 544.5 of the Regulations and Section 4 of the By-Laws of Beverly Hills Federal Savings and Loan Association, and other law respectively as follows:

(a) Eugene Webb, Jr. and Marguerite R. Webb have violated their fiduciary responsibilities to the shareholders of Beverly Hills Federal Savings and Loan Association by making a special and secret profit and consideration in return for their transfer of the proxies of the shareholders to Bart Lytton, Beth Lytton, Samuel J. Sills and Thomas W. Clarke, in which action and other current members of the then Board of Directors joined;

(b) Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C.

Jones have violated their fiduciary responsibilities of loyalty and good faith to the shareholders of Beverly Hills Federal Savings and Loan Association by participating in the furtherance and accomplishment of an agreement by certain directors to elect and maintain designated persons in office as Officers and Directors of said Association, which was against public policy and accordingly void, and all said participating directors acted with the knowledge of said unlawful agreement;

(c) The Board of Directors of Beverly Hills Federal Savings and Loan Association, which attempted to elect new Directors on March 14, 1961, acted illegally and in violation of the Regulations of the Federal Home Loan Bank Board in that there was not a quorum present to fill vacancies on the Board of Directors, since Richards Matthews, Jr. was not present at this reconvened meeting and since Eugene Webb, Jr. and Marguerite R. Webb could not participate by law, since they were interested parties;

(d) The proxy holders of Beverly Hills Federal, who were originally Eugene Webb, Jr., Marguerite R. Webb, Robert G. Rufi, Eugene Webb, III and Richards Matthews, Jr., violated the law when they respectively transferred their proxies for a consideration;

(e) Bart Lytton, Beth Lytton, Thomas W. Clarke and the Board of Directors of Lytton Financial Corporation are equally at fault for the violation of law and the regulations of this Board in the reconstitution of the Board of Directors of Beverly Hills Federal Savings and Loan Association, the purchasing of directorships and the sale of proxies, with the Webbs and the former Board of Directors of Beverly Hills Fed-

eral Savings and Loan Association, since they participated in and encouraged these respective transactions;

(f) The current Board of Directors of Beverly Hills Federal Savings and Loan Association have not been properly elected for the reasons hereinbefore described.

RESOLVED That pursuant to and under authority of Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C.A. § 1464(d)(1), notice is hereby given to Beverly Hills Federal Savings and Loan Association, its Directors as of March 13, 1961, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, and its Directors since March 14, 1961, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H. P. Braman and Glenn Wilson, and to Lytton Financial Corporation of the foregoing violations of law and the regulations of the Federal Home Loan Bank Board.

RESOLVED FURTHER That the Beverly Hills Federal Savings and Loan Association, its Directors as of March 13, 1961, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, and its Directors since March 14, 1961, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H. P. Braman and Glenn Wilson, and Lytton Financial Corporation, its Officers and Directors, are hereby given thirty (30) days from the date of receipt of this Resolution within which to correct these violations of the law and the regulations of the Federal Home Loan Bank Board and to perform the legal duties concomitant with the correction of such violations of law and the regulations of this Board.

RESOLVED FURTHER That an authenticated copy of this resolution be personally served forthwith on Beverly Hills Federal Savings and Loan Association, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi, Eugene C. Jones, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H. P. Braman, Glenn Wilson and Lytton Financial Corporation or in lieu thereof that an authenticated copy be sent forthwith by registered mail to said parties at their last known addresses as they appear on the records of the Board.

I, Harry W. Caulsen do hereby certify that I am Secretary to the Federal Home Loan Bank Board, and do further certify that the foregoing is a true and correct copy of a resolution adopted by the Federal Home Loan Bank Board at a meeting of said Board held at Washington, D.C. on the 26th day of January, 1962.

Witness my hand and the seal of said Board this 26th day of January, 1962.

Harry W. Caulsen
Secretary

EXHIBIT "B."

FEDERAL HOME LOAN BANK BOARD

No. 15,703

Date: March 30, 1962

WHEREAS, it now appearing to the Board that, in accordance with its Resolution Number 15,430, dated January 26, 1962, the following named parties were personally served on the dates indicated: Beverly Hills Federal Savings and Loan Association on January 31, 1962, upon H. P. Braman, President of the Association, and Eugene Webb, Jr. on January 31, 1962, Marguerite R. Webb on February 2, 1962, Richards Matthews, Jr. on January 31, 1962, Robert G. Rufi on January 31, 1962, Eugene C. Jones on February 1, 1962, Thomas W. Clarke on January 31, 1962, Beth Lytton on January 31, 1962, Dr. Samuel J. Sills on January 31, 1962, Bart Lytton on January 31, 1962, H. P. Braman on January 31, 1962, Glenn Wilson on January 31, 1962, and Lytton Financial Corporation on January 31, 1962, upon Bart Lytton, President of the Corporation, said service upon said parties being accomplished in accordance with Board Resolution Number 15,450, dated January 29, 1962, and

WHEREAS, all of the above named interested parties were given thirty days from the date of the receipt of Resolution Number 15,430, within which to correct violations of law and the regulations of the Federal Home Loan Bank Board contained therein and to perform the legal duties concomitant with the correction of such violations of law and the regulations of this Board, and

WHEREAS, in response to the Board Resolution Number 15,430, Eugene Webb, Jr., Marguerite R. Webb,

Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones acknowledged the receipt of the Board Resolution and in reply denied that they or any of them had violated any rule or regulation adopted by the Board or any provision of said Association's by-laws or any other applicable law and further that none of them has at any time since March 14, 1961 been a director or officer of the said Association, and therefore, none of them has power or authority to correct any of the asserted violations or to perform any legal duty assertedly concomitant with the correction of such alleged violations, and

WHEREAS, no response was received from Beverly Hills Federal Savings and Loan Association and on February 21, 1962, A. C. Newell, Supervisory Agent, Federal Home Loan Bank Board was served with a complaint for declaratory judgment and injunction and other relief, instituted in behalf of the Beverly Hills Federal Savings and Loan Association, in which said Association, in paragraph six of said complaint, stated that the "ultimate conclusion" of Resolution Number 15,430 "was that the directors of the plaintiff association, . . . had not been properly elected and had been elected in violaton of law and regulation" and concluded the complaint by praying: "1. That the court make and enter a declaratory judgment declaring the present board of directors to be duly elected, qualified and acting directors of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, "2. That the FEDERAL HOME LOAN BANK BOARD be enjoined preliminarily from further actions or proceedings against the plaintiff association during the pendency of the within action," and "3. That the court

grant to plaintiff such other and further relief as the court may deem just and proper in accordance with 28 U.S.C. 2202 . . .”, and

WHEREAS, the Respondents, Bart Lytton, Beth Lytton, Thomas W. Clarke, Dr. Samuel J. Sills, H. P. Braman and Glenn Wilson have not personally responded, and

WHEREAS, it appears that Beverly Hills Federal Savings and Loan Association, acting through its purported officers and directors, has attempted to exercise an election provided in Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464(d)(1), which allows the Association affected thirty days after service of said notice to apply, if it wishes, to the United States District Court for the District where the association is located for declaratory judgment, an injunction or other relief in regard to the alleged violations of law or regulations set forth in the resolution served upon said association, and

WHEREAS, it appears that Beverly Hills Federal Savings and Loan Association, acting through its purported officers and directors, has sought relief as to only a portion of the violations of law and regulations alleged in Board Resolution Number 15,430 and it appearing further that in filing its complaint, there was not a full and complete disclosure made to the United States District Court for the Southern District of California, Central Division, of the entire nature of the proceedings instituted, and

WHEREAS, it appears to the Board that none of the interested parties charged in Board Resolution Number 15,430, other than Beverly Hills Federal Savings and Loan Association, has elected to proceed in Federal

Court and they have not been made parties to the proceeding therein by the Association, and it appearing further to the Board that these interested parties have the right to a full and appropriate hearing to afford them the opportunity to protect their respective interests, which would include their valuable property rights to enjoy a relationship of trust and responsibility with the Association in the capacity of officers, directors, employees or agents of, and parties otherwise directly or indirectly connected with the management or control of Beverly Hills Federal Savings and Loan Association, presently or in the future, and

WHEREAS, in order to protect the rights of the above interested parties and to afford a hearing on all issues presented in Board Resolution Number 15,430 in regard to Beverly Hills Federal Savings and Loan Association, the Federal Home Loan Bank Board hereby orders a hearing to be held as set forth in the penultimate paragraph of this Resolution, at which time the Respondents will be required to answer the Charges set forth hereinafter in this Resolution, and

WHEREAS, Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464(d)(1) provides that in the event the Association concerned does not comply with law or regulation within the thirty day period, then the Board shall give such Association twenty days written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such violation of duty, and

WHEREAS, the parties named in paragraph 1 of this Resolution (hereinafter referred to as the Respondents) were or are officers, directors, employees or agents of, or otherwise directly or indirectly connected with the

management or control of Beverly Hills Federal Savings and Loan Association, and

WHEREAS, under the provisions of Section 5(a) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464(a), the Board is authorized to provide for the organization, incorporation, examination, operation and regulation of Federal Savings and Loan Associations, and

WHEREAS, under the provisions of Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1464(d)(1), authorizing the Board to enforce any provision of this section or rules and regulations made thereunder or any other law or regulation, the Respondents named herein are charged as follows: CHARGE I. (a) The Respondents, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones have violated their fiduciary duties to the other members of Beverly Hills Federal Savings and Loan Association in that they, individually and collectively, took advantage of their powers as officers and directors of Beverly Hills Federal Savings and Loan Association to effectuate and consummate an opportunity to further their own individual interests and in furtherance thereof exercised and abused their powers as officers and directors for "good and valuable consideration", and failed to disclose the nature of such consideration and to reveal all material and relevant facts to the other members of Beverly Hills Federal Savings and Loan Association.

(b) Lytton Financial Corporation, acting through Thomas W. Clarke, Senior Vice President and Attorney and Bart Lytton, President, Chairman of the Board and a Director, was the offeror of the opportu-

ity afforded to the Respondents listed in Paragraph (a) of this Charge I and with knowledge participated in the consummation of the breaches of trust alleged in Paragraph (a) of this Charge I and further with knowledge accepted the benefits received from these breaches of trust.

CHARGE II. (a) The Respondents, Bart Lytton, Beth Lytton, Thomas W. Clarke and the Board of Directors of Lytton Financial Corporation, acting for and on behalf of said Corporation, unlawfully purchased proxies from Respondents, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., and Robert G. Rufi, and these latter parties unlawfully sold and transferred these proxies for good and valuable consideration.

(b) The Respondent, Bart Lytton, voted the aforementioned 18,146 unlawfully purchased proxies, representing 471,458 votes, which had been obtained under power of substitution from Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Eugene Webb, III, and Robert G. Rufi, at the Meeting of Shareholders of Beverly Hills Federal Savings and Loan Association, held on Wednesday, January 17, 1962 at 8:30 o'clock a.m. at the offices of the Association at 9424 Wilshire Boulevard, Beverly Hills, California.

(c) The Respondents, Eugene Webb, Jr. and Marguerite R. Webb, as interested directors, violated §544.5 of the Regulations of the Federal Home Loan Bank Board and Section 4 of the By-Laws of Beverly Hills Federal Savings and Loan Association by attempting to conduct a meeting of the Board of Directors of Beverly

Hills Federal Savings and Loan Association and transacting business without a quorum on or about the 14th day of March, 1961 at 1:30 p.m. at the offices of the Title Insurance and Trust Company, 433 South Spring Street, Los Angeles, California.

(d) The Respondents, Robert G. Rufi and Eugene C. Jones, violated §544.5 of the Regulations of the Federal Home Loan Bank Board and Section 4 of the By-Laws of Beverly Hills Federal Savings and Loan Association, when they knowingly participatef in a meeting of the Board of Directors of Beverly Hills Federal Savings and Loan Association, on or about the 14th day of March, 1961 at 1:30 p.m. at the offices of the Title Insurance and Trust Company, 433 South Spring Street, Los Angeles, California and transacted most important business, namely, an election to fill vacancies in the Board of Directors without a quorum and knowingly allowed Eugene Webb, Jr., and Marguerite R. Webb, interested directors, to participate in this meeting.

(e) The Respondent, Richards Matthews, Jr., violated his fiduciary duties of loyalty and good faith to the other members of Beverly Hills Federal Savings and Loan Association when he resigned his directorship as part of an agreement by certain directors to elect and maintain designated persons in office as officers and directors of the Association and when he knowingly absented himself from the reconvened meeting of the Board of Directors, referenced in paragraphs (c) and (d) of this Charge II, and allowed most important business, namely an election to fill vacancies in the Board of Directors, to be transacted without a quorum and

without his taking action consonant with his duties owed to the other members of the Association as a director.

(f) Respondents, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi, and Eugene C. Jones, violated their fiduciary responsibilities of loyalty and good faith to the shareholders of Beverly Hills Federal Savings and Loan Association by participating in the furtherance and accomplishment of an agreement by certain directors to elect and maintain designated persons in office as Officers and Directors of Beverly Hills Federal Savings and Loan Association, which was against public policy and accordingly void, and all said participating directors acted with the knowledge of said unlawful agreement.

CHARGE III. The Respondents, Bart Lytton, Beth Lytton, Thomas W. Clarke, and the Board of Directors of Lytton Financial Corporation, are equally at fault for the violation of law and the regulations of this Board in the purported reconstitution of the Board of Directors of Beverly Hills Federal Savings and Loan Association, the purchasing of directorships, and the sale of proxies, with the Webbs and the former Board of Directors of Beverly Hills Federal Savings and Loan Association, since they participated in and encouraged these respective transactions.

CHARGE IV. The Respondents, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton and Lytton Financial Corporation, by their unlawful actions, as charged above and the unlawful actions of Respondents, Beth Lytton, Thomas W. Clarke and Dr. Samuel J. Sills, which were cor-

rected, as set forth in the penultimate and last paragraphs of Page 3 of Board Resolution Number 15,430, have demonstrated a pattern of lack of responsibility and respect for law and the regulations of the Federal Home Loan Bank Board and their duties as officers, directors, employees or agents of, or parties otherwise directly or indirectly connected with the management or control of, a Federal Savings and Loan Association by their failure to disclose fully these unlawful actions to the shareholders of Beverly Hills Federal Savings and Loan Association, which they had a legal duty to so fully disclose to the beneficiaries of their trust.

RESOLVED, that pursuant to and under the authority of the provisions of Section 5(d)(1) of the Home Owners' Loan Act of 1933, as amended (12 U.S.C. §1464-(d)(1)) and Section 509.3 of the Rules and Regulations of the Federal Home Loan Bank Board (12 CFR §509.3), a hearing in accordance with the provisions of Section 5 of the Administrative Procedure Act (5 U.S.C. §1004) will be held at 10 a.m. on the 8th day of May, 1962, at Room 1800, 615 South Flower Street, Los Angeles, California, as to such alleged violations of law or regulation and any legal duty; *provided however*, that the hearing date shall be subject to modification of the Board, upon notice to all interested parties, subject to the disposition of the complaint in *Beverly Hills Federal Savings and Loan Association v. Federal Home Loan Bank Board*, Civil Action No. 62-305-K, in the United States District Court for the Southern District of California, Central Division.

RESOLVED FURTHER, that an authenticated copy of this resolution be personally served forthwith on Beverly Hills Federal Savings and Loan Association, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi, Eugene C. Jones, Thomas W. Clarke, Beth Lytton, Dr. Samuel J. Sills, Bart Lytton, H. P. Braman, Glenn Wilson and Lytton Financial Corporation or in lieu thereof that an authenticated copy be sent forthwith by registered mail to said parties at their last known addresses as they appear on the records of the Board.

I, Harry W. Caulsen, do hereby certify that I am Secretary to the Federal Home Loan Bank Board, and to further certify that the foregoing is a true and correct copy of a resolution adopted by the Federal Home Loan Bank Board at a meeting of said Board held at Washington, D. C. on the 30th day of March, 1962.

Witness my hand and the seal of said Board this 30th day of March, 1962.

Harry W. Caulsen
Secretary

EXHIBIT "C"

STIPULATION FOR SETTLEMENT AND
ENTRY JUDGMENT OF DISMISSAL.

In the United States District Court for the Southern District of California, Central Division.

Beverly Hills Federal Savings and Loan Association, Plaintiff, vs. Federal Home Loan Bank Board, et al., Defendants. Civil Action No. 62-305 FW

IT IS HEREBY STIPULATED by and between plaintiff Beverly Hills Federal Savings and Loan Association, defendants Lytton Financial Corporation, Bart Lytton, Beth Lytton, Thomas W. Clarke, Samuel J. Sills, H. P. Braman and Glenn Wilson (hereinafter referred to as "Lytton Defendants"), and defendant and cross-complainant Federal Home Loan Bank Board, by and through their respective counsel as follows:

1. The above entitled litigation and the administrative proceedings from which it arose have been pending for over three years and the controversies between these parties involved therein still remain unresolved. There are numerous discovery matters still pending with respect to some of which appeals have been taken. It is apparent that the litigation cannot be disposed of by trial in the reasonably near future.

2. Continuance of this litigation constitutes a substantial burden upon plaintiff, upon the Lytton Defendants, and upon defendant and cross-complainant Federal Home Loan Bank Board.

3. Defendant and cross-complainant, Federal Home Loan Bank Board has broad plenary power over and responsibility for the operations of plaintiff Beverly

Hills Federal Savings and Loan Association and for the operation of the entire Federal thrift system of which plaintiff is a part.

4. The parties hereto have agreed to a disposition of the controversies between them.

5. A disposition of these controversies on the terms which have been agreed upon is in the best interests of the plaintiff and its members, the Lytton Defendants, the defendant and cross-complainant Federal Home Loan Bank Board and of the entire thrift system over which said Board has jurisdiction.

6. The above entitled case shall be disposed of insofar as the Lytton Defendants are concerned by the entry of a judgment of dismissal with prejudice in the form attached, which is hereby approved and made a part of this stipulation subject, however, to the following conditions:

- (a) This stipulation shall be submitted to the Court and this Court shall be requested to enter a judgment of dismissal in accordance therewith.
- (b) A judgment in the form attached is signed and entered by the Court on or before February 15, 1965, unless said date shall be extended for a further period not to exceed thirty days by defendant and cross-complainant Federal Home Loan Bank Board, said extension to be accomplished by written notice to the other parties to this stipulation.

7. Plaintiff, Beverly Hills Federal Savings and Loan Association, agrees that defendant, Lytton Financial Corporation may file a consolidated income tax return for the Southland Company for the period of the year

1965 during which the Southland Company was a wholly owned subsidiary of Lytton Financial Corporation and Lytton Financial Corporation agrees that it will pay the income tax, if any, due for such period Plaintiff, Beverly Hills Federal Savings and Loan Association, further agrees that it will not permit or cause the Southland Company to revoke said consent.

8. The Lytton Defendants who were officers or directors of Plaintiff have tendered to plaintiff their resignations as officers and directors of Plaintiff Beverly Hills Federal Savings and Loan Association, and have obtained the resignation of the other director of Plaintiff, Beverly Hills Federal Savings and Loan Association. Said resignations were delivered to Defendant and Cross-Complainant Federal Home Loan Bank Board and have been accepted. New directors replacing each of said resigning directors have been elected.

9. The Lytton Defendants have surrendered all proxies of the members of Beverly Hills Federal Savings and Loan Association of which they had possession or control to Defendant and Cross-Complainant Federal Home Loan Bank Board, and shall undertake no new or further solicitation of proxies thereof for a period of three (3) years from the date of the surrender of the said proxies. Upon such surrender all rights and powers of said Lytton Defendants other than Defendant Glenn Wilson pursuant to said proxies were hereby terminated and cancelled. The rights and powers under said proxies then vested in Defendant Glenn Wilson, who at the request of the Defendant and Cross-Complainant Federal Home Loan Bank Board exercised his power of subscription under said proxies to substitute therein the designee or designees or designees of De-

fendant and Cross-Complainant Federal Home Loan Bank Board. Said proxies and all powers thereunder, including those of Glenn Wilson, if not sooner terminated shall terminate and the same shall be cancelled on January 30, 1966.

10. The performance of the acts specified in paragraphs 8 and 9 above, having occurred, there shall exist no further obligation, liability or duty on the part of any of said Lytton Defendants either to Plaintiff Beverly Hills Federal Savings and Loan Association, its members, or Defendant and Cross-Complainant Federal Home Loan Bank Board with respect to any of the transactions or matters set forth in said amended and supplemental complaint, or in said answers, counterclaims and cross claims, or their conduct or actions with respect thereto. There shall likewise exist no further obligation, liability or duty on the part of the Plaintiff Beverly Hills Federal Savings and Loan Association, its members, or the Defendant and Cross-Complainant Federal Home Loan Bank Board to the Lytton Defendants with respect to any of the transactions or matters set forth in the said amended and supplemental complaint, or in said answers, counterclaims and corss-claims.

11. In accordance with the provisions of Section 5(c) of the Home Owners' Loan Act of 1933, as amended by Public Law 88-560 of the 88th Congress and with the appropriate approval of Defendant and Cross-Complainant Federal Home Loan Bank Board heretofore given, Plaintiff Beverly Hills Federal Savings and Loan Association has purchased, and Defendant Lytton Financial Corporation has sold, all of the outstanding capital stock of the Southland Company, a

California corporation, which said Southland Company is referred to in the amended and supplemental complaint and in the answers, counterclaims and cross-claims above referred to, upon the following terms and conditions:

- (a) Plaintiff Beverly Hills Federal Savings and Loan Association has paid the sum of \$1,500,000.00 cash to Defendant Lytton Financial Corporation for said stock.
- (b) Defendant Lytton Financial Corporation has transferred said shares of said capital stock of Southland Company to Plaintiff Beverly Hills Federal Savings and Loan Association.
- (c) The Lytton Defendants who were officers or directors of Southland Company have tendered to Southland Company their resignations as officers and directors of Southland Company. Said resignations have been delivered to Plaintiff and accepted.
- (d) Defendant Lytton Financial Corporation has warranted that the assets and liabilities of Southland Company at the time of said transfer are as set forth in the pro forma statement as of November 30, 1964, heretofore delivered by Defendant Lytton Financial Corporation to Defendant and Cross-Complainant, Federal Home Loan Bank Board, Defendant Lytton Financial Corporation shall be entitled to retain all earnings and assets of the said corporation in excess of those shown on said pro forma statement.

12. In the event any of the conditions set forth in paragraph 6 above, are not met for any reason whatever including prevention by Court order, this stipulation shall be of no further force and effect and the parties hereto shall have no obligations hereunder nor under the terms of the judgment of dismissal, and the parties will take all necessary actions to place the parties in the positions which they occupied prior to the acts reflected in this stipulation.

13. The execution of this stipulation and the implementation of the settlement hereby contemplated and described shall not in any respect affect or constitute a waiver or release of any claim or claims of plaintiff or of defendant and cross-complainant, Federal Home Loan Bank Board, against any persons except the Lytton Defendants, and it is expressly understood that plaintiff and defendant and cross-complainant, Federal Home Loan Bank Board, do not waive or relinquish any claim or claims against any other persons, firms or corporations than those expressly named or designated herein and retain all their claims and causes of action against all other parties to this action. Further, such execution and implementation shall not be construed as a compensation with respect to any claim for damages asserted by or in behalf of plaintiff in any of the pleadings in this action. Nor shall the execution of this stipulation and the implementation of the settlement in any respect constitute any admission of any wrongdoing of any kind or character by any of the Lytton Defendants. Nor shall the execution of this stipulation and

the implementation thereof in any respect confer any rights upon plaintiff or upon defendant and cross complainant Federal Home Loan Bank Board which they would not otherwise have against any parties other than the Lytton Defendants.

Dated: January 14, 1965.

GLEN R. MILLER
THOMAS N. DOWD
ROBERT B. HANKINS
PIERSON, BALL & DOWD

By /s/ Robert B. Hankins
Robert B. Hankins
Attorneys for Plaintiff
Beverly Hills Federal Savings
and Loan Association

RICHARD P. BYRNE
PHILIP R. COLLINS
MacCRACKEN, COLLINS & HAWES

By /s/ Philip R. Collins
Philip R. Collins
Attorneys for Defendant and
Cross-Complainant Federal
Home Loan Bank Board

O'MELVENY & MYERS
RODNEY K. POTTER
By /s/ Rodney K. Potter
Rodney K. Potter
Attorneys for Lytton Defendants

COVENANT NOT TO SUE

For and in consideration of the performance of the acts specified in that certain stipulation dated January 14, 1965 in that certain action entitled Beverly Hills Federal Savings and Loan Association, Plaintiff, vs. Federal Home Loan Bank Board, et al, Defendants, pending in the U. S. District Court, Southern District of California, and being No. 62305 FW in the files of said Court, Beverly Hills Federal Savings and Loan Association and the Federal Home Loan Bank Board, Covenantors, covenant to Lytton Financial Corporation, Bart Lytton, Beth Lytton, Thomas W. Clarke, Samuel J. Sills, H. P. Braman and Glenn Wilson, Covenantees, as follows:

1. Covenantors covenant and agree that they will not at any time hereafter commence, maintain or prosecute any action or proceeding or assert any claim against Covenantees or any of them for relief of any kind on account of any of the following matters occurring during the period Covenantees or any of them shall have occupied any position as an officer, director, employee or attorney of Covenantor Beverly Hills Federal Savings and Loan Association, insofar as any such matters shall appear in or be disclosed by the books and records of Beverly Hills Federal Savings and Loan Association: Contributions made by Beverly Hills Federal Savings and Loan Association to charity or to civic or philanthropic organizations; expenses of officers, directors or attorneys paid by Beverly Hills Federal

Savings and Loan Association; expenses incurred and paid by Beverly Hills Federal Savings and Loan Association for public relations counseling or services; attorneys fees paid by Beverly Hills Federal Savings and Loan Association to any attorney; and compensation or bonus paid to any officer, attorney, director or employee of Beverly Hills Federal Savings and Loan Association. By the acceptance of this covenant Covenantors warrant and represent that the books and records of Beverly Hills Federal Savings and Loan Association truly reflect all of the matters referred to in paragraph 1 hereof.

2. Covenantors further covenant and agree that they will not at any time hereafter commence, maintain or prosecute any action or proceeding or assert any claim against Covenantees or any of them for relief of any kind on account of the participation of Covenantees or any of them in causing or implementing the settlement of said action by judgment pursuant to stipulation between Covenantors and Covenantees.

3. The execution of this Covenant Not To Sue does not represent to Covenantors and shall not be construed as a compensation for any claim which either of them may have on account of any of the matters above referenced in paragraphs 1 and 2 hereof, and it is understood that Covenantors do not in any manner or respect waive or relinquish any claim or claims against any other persons, firms or corporations than those expressly named and designated herein as Covenantees

and that specifically Covenantors retain their claims and causes of action against all other persons with respect to any such matters.

BEVERLY HILLS FEDERAL SAV-
INGS AND LOAN ASSOCIATION

By /s/ Preston N. Silbaugh

FEDERAL HOME LOAN BANK
BOARD

By /s/ Joseph P. McMurray

ATTEST:

/s/ Leonard M. Smith

Secretary

ATTEST:

/s/ Harry Caulsen

Secretary

APPENDIX "B."

Answer to Second Amended and Supplemental Complaint for Declaratory Judgment, to Impress a Trust, and Other Relief.

United States District Court, Central District of California.

Beverly Hills Federal Savings and Loan Association, Plaintiff, vs. Federal Home Loan Bank Board, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi, Eugene C. Jones, and Title Insurance and Trust Company, Defendants. Civil Action No. 62-305-FW.

Filed Nov. 23, 1966.

ANSWER OF DEFENDANT, FEDERAL HOME LOAN BANK BOARD

Defendant, Federal Home Loan Bank Board, by its attorneys, in answer to the Second Amended and Supplemental Complaint for Declaratory Judgment, to Impress a Trust, and Other Relief (hereinafter referred to as "complaint") states as follows:

1. Defendant, Federal Home Loan Bank Board, admits the allegations contained in paragraph 1 of the complaint and alleges further that the preceding complaints filed heretofore in this controversy also arose and were filed under the provisions of the alleged statutory provisions.

2. Defendant, Federal Home Bank Board, admits the allegations contained in paragraph 2 of the complaint but contends that such allegation is irrelevant, since jurisdiction of the complaint is conferred by fed-

eral statute, 12 U.S.C. § 1464(D)(1) and is not dependent upon any requisite amount in controversy.

3. Defendant, Federal Home Loan Bank Board, admits the allegation as to the location of the home office of the plaintiff, Beverly Hills Federal Savings and Loan Association (hereinafter referred to as "Association"), but denies the remainder of the allegations contained in paragraph 3 of the complaint on the basis that such allegations are incomplete. Defendant, Federal Home Loan Bank Board alleges that plaintiff, Association, is a federal savings and loan association, whose original Federal Charter was issued under the Home Owners Loan Act of 1933, as amended (hereinafter referred to as "the Act") on November 6, 1936 as Southland Federal Savings & Loan Association and the name of such association was changed to Beverly Hills Federal Savings & Loan Association by Federal Home Loan Bank Board Resolution No, 10,651, dated April 15, 1957, said Association currently existing under a "Charter K (Rev.);" Number 1302, issued by the Federal Home Loan Bank Board on or about April 15, 1957.

4. Defendant, Federal Home Loan Bank Board, admits the allegations contained in paragraph 4 of the complaint.

5. Defendant, Federal Home Loan Bank Board, admits the allegations contained in paragraph 5 of the complaint.

6. Defendant, Federal Home Loan Bank Board, admits the allegations contained in paragraph 6 of the complaint.

7. Defendant, Federal Home Loan Bank Board, admits the allegations contained in the first and third

sentences of paragraph 7 of the complaint. Defendant, Federal Home Loan Bank Board, admits the allegations contained in the second sentence of paragraph 7 of the complaint to the effect that Eugene Webb, Jr. was president of the plaintiff, Association, but said defendant further alleges that the defendant Eugene Webb, Jr. for a long time prior to and on March 14, 1961, was also the Chief Executive Officer of the plaintiff, Association.

8. Defendant, Federal Home Loan Bank Board, admits the allegations contained in the second, third and fourth sentences of paragraph 8 of the complaint, but denies that portion of the first allegation contained in the first sentence of paragraph 8 of the complaint and alleges that since 1957 and specifically on March 14, 1961 the Southland Company was a corporation organized under the laws of California and engaged in the mortgage, insurance, escrow and related business, and furthermore its predecessor was a California corporation engaged in the same business and known as the Southland Mortgage Company.

9. Defendant, Federal Home Loan Bank Board, admits the allegations in the first sentence of paragraph 9 of the complaint as to the ownership of the outstanding stock of the Southland Company, but denies that portion of the allegations contained in the first sentence of paragraph 9 of the complaint as to "a long time prior to and on March 14, 1961" and alleges that since 1957, and specifically on March 14, 1961 the Southland Company was a corporation organized under the laws of the State of California and engaged in the mortgage, insurance, escrow and related business and furthermore, its predecessor was a California corpora-

tion engaged in the same business and known as the Southland Mortgage Company. Defendant, Federal Home Loan Bank Board admits the allegations contained in the second and third sentences of paragraph 9 of the complaint.

10. The Defendant, Federal Home Loan Bank Board, admits the allegations contained in the first, second, third and fourth sentences of paragraph 10 of the complaint but more affirmatively avers and describes the said transactions alluded to in these allegations as follows: On or about March 9, 1961, defendant, Eugene Webb, Jr., together with his spouse, defendant, Marguerite R. Webb, as Trustees for Eugene Webb, III and Beverly Diana Marguerite Webb, their children, entered into a "Buy and Sell Agreement" for the sale of all of the outstanding and issued shares of stock of the Southland Company to Lytton Financial Corporation, acting by and through Thomas W. Clarke, for the sum of \$1,500,000.00 whereby it was also provided that the said defendants, Eugene Webb, Jr. and Marguerite R. Webb would do "any and all things necessary, and execute any and all necessary documents or agreements, as may be required by the buyer, in order to assure the continuance of the present business relationship between the Southland Company and the Beverly Hills Federal Savings and Loan Association." On or about March 14, 1961, Eugene Webb, Jr. and Marguerite R. Webb entered into a Personal Service Agreement with Lytton Financial Corporation, acting by and through Bart Lytton, the said agreement providing that the Webbs would be paid the sum of three hundred thousand dollars (\$300,000.00) over a five year period, payable sixty thousand dollars

(\$60,000.00) per year, annually in advance, the first payment of sixty thousand dollars (\$60,000.00) being payable upon the execution of the Agreement, irrespective of whether either or both of said parties survived the period of the agreement and were, in fact, able to perform the consultant services provided in said Agreement, said sums representing in fact the further consideration for the transfer, sale and control of the Association. Defendant, Federal Home Loan Bank Board, denies the first and third allegations contained in the fifth sentence of paragraph 10 of the complaint and affirmatively avers that on the afternoon of March 14, 1961, at or about 1:30 p.m., Pacific Standard Time, Eugene Webb, Jr., as an interested director, violated § 544.5 of the Regulations of the Federal Home Loan Bank Board and Section 4 of the By-Laws of the plaintiff, Association, by attempting to conduct a meeting of the Board of Directors of the Association and attempting to transact most important business, namely, an election to fill vacancies in the Board of Directors without a quorum. Defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones violated their fiduciary responsibilities of loyalty and good faith to the shareholders of the plaintiff, Association, by participating in the furtherance and accomplishment of an agreement to elect and maintain certain designated persons in office as Officers and Directors of the plaintiff, Association. Defendant, Federal Home Loan Bank Board, denies the second allegation contained in the fifth sentence of paragraph 10 of the complaint and alleges affirmatively that on or about March 14, 1961, as part of the consideration to Lytton Financial Corporation for the purchase of the Southland

Company, the power of substitution, contained in all proxies of members of the plaintiff, Association, constituting and appointing Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr. Eugene Webb, III and Robert G. Rufi, in the order named proxy for and in the name, place and stead of the signing member, was "for good and valuable consideration", exercised by substituting Bart Lytton, Beth Lytton, Dr. Samuel J. Sills and Thomas W. Clarke for the individuals previously named, in the order named. Defendant, Federal Home Loan Bank Board, admits the allegations contained in the sixth sentence of paragraph 10 of the complaint and further affirmatively alleges that Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones participated and acted with knowledge of the unlawfulness of the agreement to elect and maintain certain designated persons in office as Officers and Directors of the plaintiff, Association, and the defendant, Eugene Webb, Jr., acting as a director and President of plaintiff, Association, and Marguerite R. Webb, acting as a director, First Vice President and Chairman of the Board of Directors of plaintiff, Association, took the advantage and opportunity to transfer the plaintiff, Association, by coupling it with the transfer and sale of the Southland Company, of which Eugene Webb, Jr., was a director, General Manager, and President and Marguerite R. Webb was a director, Vice President and Assistant Secretary.

11. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 11 of the complaint but more affirmatively avers that the control of the plaintiff, Association, including the

proxies of members therein and the directorships thereof, and the value of said control, proxies and directorships are assets of the plaintiff, Association and its members and the sale thereof was wrongful and unlawful and was in willful, deliberate and extreme disregard for and in violation of the fiduciary duties owed by defendants, Eugene Webb, Jr. and Marguerite R. Webb.

12. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 12 of the complaint but more affirmatively avers that the defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones have as a result of all actions alleged as violations by these said defendants in Federal Home Loan Bank Board Resolutions No. 15, 431 and No. 15,703, violated Federal Law, the Regulations of the Federal Home Loan Bank Board and "other law", which included violation of state law and federal common law.

13. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 13 of the complaint but asserts no claim for damages, either compensatory or punitive, against any of the defendants save the defendants, Eugene Webb, Jr., and Marguerite R. Webb.

14. The Defendant, Federal Home Loan Bank Board denies the allegations contained in paragraph 14 of the complaint except insofar as it alleges that the plaintiff, Association was under the control and domination of Bart Lytton and more affirmatively avers that Bart Lytton, acting through Beth Lytton, Samuel J. Sills, Thomas W. Clarke, H. B. Braman and Glenn

Wilson at various times from the 15th day of March, 1961 until the 14th day of January, 1965, was in sole control of the plaintiff, Association.

15. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 15 of the complaint.

16. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 16 of the complaint.

17. The Defendant, Federal Home Loan Bank Board denies the allegations contained in paragraph 17 of the complaint and more affirmatively avers that the plaintiff, Association on February 20, 1962 acting under the control of Bart Lytton, through his control of the then directors of the plaintiff, Association, filed this action in declaratory relief to have the court declare that the sale transaction was valid and to enjoin the defendant, Federal Home Loan Bank Board from proceeding with its resolutions and written charges or from correcting the violations.

18. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 18 of the complaint and more affirmatively alleges that the Judgment of Dismissal (Exhibit A hereof) specifically preserves the causes of action asserted herein against the defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones.

19. The Defendant, Federal Home Loan Bank Board admits the allegations contained in the first conjunctive clause of the first sentence of paragraph 19 of the complaint, but denies the allegations contained

in the second conjunctive clause of the first sentence of paragraph 19 of the complaint to the effect that the defendant, Title Insurance and Trust Company was a true co-trustee of the trust referred to in the complaint, affirmatively averring that the said defendant, Title Insurance and Trust Company could be more properly termed as a mere corporate trustee with no voting rights to control said trust. The Defendant, Federal Home Loan Bank Board admits the allegations contained in the second sentence of paragraph 19 of the complaint and affirmatively avers that the said defendant, Title Insurance and Trust Company specifically did not join in the warranties contained in Buy and Sell Agreement between the defendants, Eugene Webb, Jr. and Marguerite R. Webb and the Lytton Financial Corporation, nor did the said defendant, Title and Insurance and Trust Company execute the aforementioned Buy and Sell Agreement. The Defendant, Federal Home Loan Bank Board denies that part of the allegations contained in the third sentence of paragraph 19 of the complaint that the Title Insurance and Trust Company is a necessary party to this cause of action for the purpose of facilitating the enforcement of any orders made by the court with respect to the trust or the trust property.

20 The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 20 of the complaint but affirmatively avers that the plaintiff, Association is not seeking as complete and full relief as the Defendant, Federal Home Loan Bank Board asserts in currently pending cross-claims against the defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones, which were asserted at the very outset of this litigation.

21. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 21 of the complaint.

22. The Defendant, Federal Home Loan Bank Board admits the allegations contained in paragraph 22 of the complaint but more affirmatively avers that there are other extant controversies which are evident from a comparison of the Second Amended and Supplemental Complaint of the plaintiff, Association with the currently outstanding Cross-Claims of the Defendant, Federal Home Loan Bank Board as to the Defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr. Robert G. Rufi and Eugene C. Jones, as well as this pleading of the Defendant, Federal Home Loan Bank Board, a regulatory agency charged with the supervision of federally-chartered Savings and Loan Associations, which is asserting broader and more extensive claims than the plaintiff, Association whose claims from an examination of the Second Amended and Supplemental Complaint are of a more narrow scope by virtue of its status as a thrift institution rather than a regulatory agency, with the exception that the Defendant, Federal Home Loan Bank Board has not asserted claims for punitive or compensatory damage against the defendants, Richards Matthews, Jr., Robert G. Rufi or Eugene C. Jones.

WHEREFORE, it is prayed:

1. That injunctive and coercive relief be directed against the plaintiff, Association through its present managing parties to correct such violations of law and Federal Regulations in the manner hereinafter set forth in his prayer and include a full disclosure to the mem-

bers of the said plaintiff, Association of all breaches of trust and responsibility found to have been committed by the defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones.

2. That the defendants, Eugene Webb, Jr., Marguerite R. Webb, Robert G. Rufi, Richards Matthews, Jr. and Eugene C. Jones be barred from serving in a capacity of trust and responsibility directly or indirectly as an officer, director or party directly or indirectly connected with the management or control of Beverly Hills Federal Savings & Loan Association for five years from the final order of this court directing such relief.

3. That the plaintiff, Association shall be enjoined from reimbursing for legal expenses and fees, the defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones who are found to have been guilty of wrongdoing in connection with any legal proceeding for which reimbursement is sought.

4. That the Court enter judgment for punitive damages against the defendants, Eugene Webb, Jr. and Marguerite R. Webb, for their respective and collective willful and deliberate disregard of their fiduciary duties to the Association and willful disregard for the requirements of law and federal regulation designed to protect the plaintiff, Association and its members, in its discretion, in an amount per individual deemed just and proper, which shall be ordered to be used by the plaintiff, Association to help defray the costs incurred by the said plaintiff, Association in the present litigation resulting from unlawful actions of these parties.

5. That defendants, Eugene Webb, Jr. and Marguerite R. Webb hold in constructive trust for the use and benefit of the plaintiff, Association the sum of one million eight hundred thousand dollars, received by or on behalf of said defendants, Eugene Webb, Jr. and Marguerite R. Webb as a consideration for the transfer of control of the plaintiff, Association, including the transfer of voting proxies and directorships in said Association.

6. That general damages be awarded against the defendants, Eugene Webb, Jr. and Marguerite R. Webb in favor of the plaintiff, Association in the sum of one million eight hundred thousand dollars (\$1,800,000.00).

7. That the defendant, Federal Home Loan Bank Board shall have judgment against the plaintiff, Association and the defendants, Eugene Webb, Jr., Marguerite R. Webb, Richards Matthews, Jr., Robert G. Rufi and Eugene C. Jones for its costs.

8. That the court grant to the defendant, Federal Home Loan Bank Board such other and further relief as to the Court may seem just and proper.

Dated: November 22, 1966.

MacCRACKEN, COLLINS & HAWES
Special Counsel for Defendant,
Federal Home Loan Bank Board.
By: Philip R. Collins
PHILIP R. COLLINS

/s/ Richard P. Byrne
RICHARD P. BYRNE
Of Counsel

APPENDIX "C."

Memorandum Decision and Opinion.

United States District Court, Central District of California.

Beverly Hills Federal Savings and Loan Association, Plaintiff, v. Federal Home Loan Bank Board, et al., Defendants. No. 62-305-FW.

Filed: April 6, 1967.

Defendants EUGENE WEBB, JR., MARGUERITE R. WEBB, RICHARDS MATTHEWS, JR., ROBERT G. RUF1 and EUGENE C. JONES moved to dismiss plaintiff's action upon its second amended and supplemental complaint on the grounds that the Court does not have jurisdiction of the subject matter of plaintiff's action against said moving defendants. Other defendants in the action who did not join in said motion are FEDERAL HOME LOAN BANK BOARD (hereinafter referred to as BOARD) and TITLE INSURANCE AND TRUST COMPANY. The moving defendants are hereinafter referred to as the WEBB GROUP. The Court originally denied the motion of the WEBB GROUP to dismiss plaintiff's action against them, (said motion as originally made by the moving defendants was made on many grounds); the Court thereafter announced to the parties that it would reconsider the motion of the WEBB GROUP to dismiss plaintiff's action against them on the ground that the Court did not have jurisdiction of the subject matter of plaintiff's said action against the WEBB GROUP; but the Court directed that there be a factual hearing or trial on the one issue as to whether or not the Court does have jurisdiction of said subject matter.

The matter thereupon came on for trial and hearing as to the specific issue of jurisdiction of the subject matter of plaintiff's action against the WEBB GROUP. Evidence, both oral and documentary, was received and the matter was thereafter submitted to the Court for decision upon the filing of memoranda of points and authorities by the parties.

There is no claim of diversity jurisdiction of the action.

While it has been argued by plaintiff that the Court has jurisdiction of plaintiff's action against the WEBB GROUP because such cause of action arises under a law of the United States,—in short, that the Federal Court has jurisdiction over an action by a Federal savings and loan association against its former directors for breach of fiduciary duty on the part of such former directors, the Court rejects such contentions. Here there is no controversy concerning the validity or construction of any Federal statute; and the claim of plaintiff against the WEBB GROUP arises from the common law, i.e. State law. See *Miami Beach Federal Savings & Loan Association v. Callander*, C.A. 5, 1960, 283 F.2d 469, 470. (The nature of the case just cited is set forth in an earlier decision in the same case cited at 256 F.2d 410.) See *Gully v. First National Bank*, 299 U.S. 109, 115.

Here there is no pendant jurisdiction of plaintiff's action against the WEBB GROUP of defendants either upon a second amended and supplemental complaint of plaintiff or upon the earlier first amended complaint of plaintiff. The requirements of pendant jurisdiction set forth in *Hurn v. Oursler*, 298 U.S. 238, are not met in this action. Plaintiff's claim against

the WEBB GROUP of defendants does not, as the Court has held, rest upon any Federal ground and is wholly independent of the claim of plaintiff against the FEDERAL HOME LOAN BANK BOARD, even assuming there is a controversy between plaintiff and the BOARD. See *Hurn v. Oursler*, *supra*, at p. 248.

If the Court ever had jurisdiction of subject matter as to the WEBB GROUP it was ancillary jurisdiction in connection with plaintiff's action against the BOARD on plaintiff's first amended complaint where the WEBB GROUP might be joined for complete relief. However, such ancillary jurisdiction, if any ever existed, has been lost because there is no longer any Federal question, or at least no substantial Federal question existing on plaintiff's second amended and supplemental complaint.

Plaintiff cannot now rely upon the first amended complaint to sustain its claim of Federal jurisdiction. *Bullen v. De Bretteville*, 239 F.2d 824, (C.A. 9, 1956).

The evidence here establishes that there is not any real controversy between plaintiff and the FEDERAL HOME LOAN BANK BOARD to give this Court Federal jurisdiction of plaintiff's action. While the plaintiff and the BOARD refer to some controversy, it is clear that such controversy, is fanciful at the best. Thus the BOARD says it contends that plaintiff has not, in effect, guaranteed that it will never employ members of the WEBB GROUP; on the other hand plaintiff says it has no present intention or foreseeable intention of employing the WEBB GROUP or any member thereof; the WEBB GROUP says they have no intention of seeking employment by the plain-

tiff. Certainly this cannot be said to be a controversy within the meaning of Federal jurisdiction.

Too, there is said to be a difference between the BOARD and plaintiff as to whether plaintiff should seek punitive damages in this action against the WEBB GROUP; plaintiff says that based upon the law it is not entitled to such punitive damages; nevertheless the BOARD says plaintiff should seek such punitive damages. Certainly this is not a controversy which justifies Federal jurisdiction.

Nor can plaintiff look to the cross-claims of the BOARD against the WEBB GROUP to give Federal jurisdiction to plaintiff's cause of action against the WEBB GROUP. See *Gully v. First National Bank, supra*, at p. 113.

The Court finds that there is no controversy between plaintiff and FEDERAL HOME LOAN BANK BOARD sufficient to give the Court jurisdiction of the subject matter of plaintiff's action against the WEBB GROUP of defendants and the Court holds that there is no Federal jurisdiction over the subject matter of plaintiff's action against the WEBB GROUP of defendants.

The foregoing constitutes the Findings of Fact and Conclusions of Law on the question of jurisdiction of subject matter.

The Court will sign and file a judgment of dismissal of plaintiff's action against the WEBB GROUP and will direct the entry of a final judgment dismissing the action against said defendants without prejudice.

DATED: April 4, 1967.

/s/ Francis C. Whelan

United States District Judge

Nos. 21957, 22404

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSO-
CIATION,

Appellant,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICH-
ARDS MATTHEWS, JR., ROBERT G. RUF1 and EU-
GENE C. JONES,

Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSO-
CIATION,

Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

APPELLANT'S REPLY BRIEF.

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Nos. 21957, 22404

IN THE

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FOR THE NINTH CIRCUIT

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSO-
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vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB, RICH-
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GENE C. JONES,

Appellees.

BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSO-
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Appellant,

vs.

TITLE INSURANCE & TRUST COMPANY,

Appellee.

APPELLANT'S REPLY BRIEF.

This brief is in reply to the brief filed by the Webb group (No. 21957), and to the brief filed by the Title Insurance & Trust Company (No. 22404).

Reply to Brief Filed by Webb Group.

1. Reply to Summary of Argument. (Webb Brief, pp. 9-11).

At pages 9-11 of the Webb brief, in the Summary of Argument, Webb says that the Association claims ancillary jurisdiction by reason of the remaining controversy between the Association and the Board, but that the trial court found that this remaining contro-

versy is not sufficient to be a basis for jurisdiction, and the court's finding is not questioned in the Association's opening brief.

The Association's opening brief did not make that argument. The arguments made in the Association's opening brief are: (a) that the court has original jurisdiction of the Association's claim against Webb under 12 U.S.C.A. 1464(d)(1) because the Board was authorized to and did give statutory notice of Webb's violation, and 12 U.S.C.A. 1464(d)(1) authorizes either the Board or the Association to bring suit to enforce the Board's notice; and (b) that in any event the court has original jurisdiction of the Board's suit against Webb under 28 U.S.C.A. 1345 and ancillary jurisdiction of the Association's related or identical claim against Webb as a cross-claim.

In addition, the Association hereby adopts the argument suggested by Webb that there is ancillary jurisdiction of the Association's claim against Webb because of the remaining controversy between the Board and the Association. The Association does not concede the correctness of the trial court's ruling that this remaining controversy is not sufficient to support jurisdiction under 12 U.S.C.A. 1464(d)(1). The second amended and supplemental complaint alleges in general terms that a controversy exists between the Board and the Association. The trial court took evidence to determine the nature and the extent of that controversy. The result was determined to be that the Board contends, and the Association denies, that the Webb group is liable for punitive damages, and that the Association should be precluded from re-employing anyone from the Webb group. The court did not

conclude that there is no controversy. The existence of the controversy is admitted. The court's conclusion that the controversy is insufficient is erroneous. The statute does not authorize the district courts to accept or decline jurisdiction based on their views of whether controversies are sufficiently important to be adjudicated. The statute provides that the district courts are to take jurisdiction of all suits brought by the Board or an association to adjudicate controversies raised by the Board's notices of violation of law.

We believe that the correct construction of the statute is that it is not limited to controversies between the Board and the Association, as such, but that it extends to adjudicating all claims raised by the Board's statutory notice of violation, vis-a-vis the real parties in interest. But if jurisdiction must depend on the existence of a controversy between the Board and the Association, such controversy does exist in this case.

2. Reply to Argument I. (Webb Brief, p. 12).

The first argument made in the Webb brief is that the Association's claim against Webb does not involve a federal question. The existence of a federal question is pleaded in the second amended and supplemental complaint, but was not argued in the Association's opening brief. Since writing that brief we have read *Murphy v. Colonial Federal Savings and Loan Association* (2nd Cir. 1967) 388 F. 2d 609, which indicates that jurisdiction may be based on 28 U.S.C.A. 1331 (federal question) and also on 28 U.S.C.A. 1337 (regulation of commerce). In the *Murphy* case shareholder-depositors of a federal savings and loan association brought suit against the association for declaratory re-

lief with respect to the association's refusal to furnish them with a list of persons eligible to vote for the directors of the association. The District Court stayed proceedings pending application to the Federal Home Loan Bank Board under 12 U.S.C.A. 1464. The Board denied the application. The District Court then granted the plaintiffs' motion for summary judgment, holding that the election of directors was unfair because there was a denial of the plaintiffs' right to be informed of the electorate. On appeal the question was whether the District Court had jurisdiction, and the judgment was affirmed. The Court of Appeals held that there was a federal question because the rights of shareholders of a federal savings and loan association is a matter of federal common law and is not dependent on the laws of the states. The court said:

“This would become readily apparent if the common law of the state where the association operated denied members a right of inspection; Congress could hardly have intended that the rights of members of Federal Savings and Loan Associations to fair elections should vary with quirks of local law.” (388 F. 2d at 611.)

In the *Murphy* case there was nevertheless a further obstacle to basing jurisdiction on a federal question because, by the nature of the claim, the \$10,000 jurisdictional amount was not necessarily present. In our case, this is, of course, not an obstacle as the amount in controversy is \$1,800,000.00. The *Murphy* court, however, did not remand to determine the amount in controversy. It was held that jurisdiction could be founded alternatively on 28 U.S.C.A. 1337, which authorizes suits arising “under any Act of Congress reg-

ulating commerce” without regard to the amount in controversy. The court held that, although federal regulation of finance is not grounded on the commerce power alone, the commerce clause is still a significant source for such regulation.

3. Reply to Argument II. (Webb Brief, pp. 12-13).

The second argument made in the Webb brief is that there is no pendent jurisdiction. As we understand it, pendent jurisdiction is when there are two claims, one federal and one non-federal, which constitute the same cause of action. The court then has pendent jurisdiction of the non-federal claim. The Association does not claim, and hence has not argued, that there is pendent jurisdiction in this case.

4. Reply to Argument III. (Webb Brief, pp. 13-17).

The third argument made in the Webb brief is entitled, “The Doctrine of Ancillary Jurisdiction Does Not Apply,” but seems to encompass both: (a) the argument made in the Webb Summary of Argument that there is no longer any substantial controversy between the Board and the Association and hence no ancillary jurisdiction over the Association’s claim against Webb; and also (b) a reply to the argument made in the Association’s opening brief that the court has original jurisdiction over the Association’s claim against Webb under 12 U.S.C.A. 1464(d)(1).

As to ancillary jurisdiction, it is stated at page 16 of the Webb brief that, “If there existed a valid substantial dispute between the Association and the Bank Board, there might be some validity in an assertion that either the Association or the Bank Board could

join other parties necessary for a complete determination of the dispute or a complete and effective granting of relief." This concession is made by Webb on the assumption that the trial court was authorized to decline jurisdiction over the remaining controversy between the Board and the Association on the theory that it is not sufficiently substantial.

As noted earlier in this reply brief, the Association agrees with Webb and accepts Webb's suggestion that the Association's claim against Webb is ancillary to the remaining controversy between the Board and the Association. The further assumption, however, that the court could refuse jurisdiction over the remaining controversy is disputed. The statute clearly does not give the court the discretion to adjudicate some controversies and to refuse to hear others. As long as a controversy exists, and here admittedly it does, the court must make a determination with respect to it. Furthermore, the trial court's conclusion that the remaining controversy is insubstantial is not warranted. The controversy with respect to Webb's liability for punitive damages is itself a substantial controversy. Everyone agrees that there was a substantial controversy between the Board and the Association when they were not agreed as to whether Webb should account for the \$1,800,000 received from Lytton. That is a substantial sum of money and hence a potentially valuable asset of the Association. The claim for punitive damages is no different. If the Association has a valid claim for punitive damages, that is also a valuable asset which should be recovered for the benefit of the Association.

With respect to the Association's argument that there is original jurisdiction of the Association's claim

against Webb under 12 U.S.C.A. 1464(d)(1), Webb argues, in essence, that the statute should not be so construed because it does not specifically provide for suits against individuals, and otherwise refers to the Board and associations as adversaries. This begs the question. The statute does not specifically say who the Board or the associations may sue. It says only that the Board or the associations may sue with respect to the alleged violation of law raised by the Board's notice of violation. The statute obviously contemplates that someone will be sued. There are two possible constructions: (a) that the associations and the Board can only sue each other and then only when they disagree as to whether the Board is correct in claiming a violation of law; or (b) that either of them can sue the real party in interest who is claimed to be in violation of law. In a situation such as this where the officers of the association are the ones claimed to have violated the law, the first interpretation is almost meaningless, and could even defeat the object of the legislation. Certainly, the ultimate purpose is to correct the violation if there is one. If the statute means only that the Board and the associations can sue each other to determine what position the association should take, the result could well be that by the time the federal court determines that the Board is correct and that the association should sue its officers in the state court, it will be too late to do so because the statute of limitations will have run. The more sensible construction is to say that the Board or the association can sue the alleged violator in the first instance. This gets at the heart of the matter and avoids the circuitous and idle procedure of merely determining whether the association should agree with the Board.

5. Reply to Argument IV. (Webb Brief, pp. 18-22).

The last argument made in the Webb brief is a reply to the Association's argument that the court has jurisdiction of the Board's claim against Webb under 28 U.S.C.A. 1345, and ancillary jurisdiction of the Association's essentially identical claim as a cross-claim.

First, there is the question of whether the district courts have general jurisdiction of claims asserted by the Federal Home Loan Bank Board as an agency of the United States under 28 U.S.C.A. 1345. Webb argues (Webb Brief, pp. 19 and 20) that the Board cannot sue individuals under 12 U.S.C.A. 1464(d)(1). That is a separate point which is argued above, and is not relevant to the question of whether there is jurisdiction under 28 U.S.C.A. 1345. *Acron Investments, Inc. v. Federal Savings and Loan Insurance Corporation* (9th Cir. 1966) 263 F. 2d 236, holds that 28 U.S.C.A. 1345 confers federal jurisdiction on all suits brought by the Federal Savings and Loan Insurance Corporation. As shown in the Association's opening brief, the Federal Home Loan Bank Board is no different from the Federal Savings and Loan Insurance Corporation insofar as being an agency of the United States is concerned. Webb attempts to distinguish the *Acron* case on the theory that it does not hold that the Federal Savings and Loan Insurance Corporation's assignor could have brought suit in the federal court. We do not rely on the *Acron* case for that proposition. It holds only that the Federal Savings and Loan Insurance Corporation can bring suit in the federal court. We rely on the *Acron* case as establishing the principal that all corporate agencies of the United States, such as the Federal Home Loan Bank Board, can sue under 28 U.S.C.A. 1345.

Next, there is a question of whether 28 U.S.C.A. 1345 applies only to complaints or whether it applies to claims asserted in other pleadings. Webb argues (Webb Brief, p. 22) that the Association's position, that it applies to all claims, finds no support in any case and is contrary to the language of 28 U.S.C.A. 1345. We submit that the Association's position is supported by *Pioche Mines Consolidated Inc. v. Fidelity Philadelphia Trust Company* (9th Cir. 1953) 206 F. 2d 336. That case applies 28 U.S.C.A. 1332 to a counter claim. 28 U.S.C.A. 1332 refers to "civil actions". 28 U.S.C.A. 1345 is even broader. It uses the words "civil actions, suits or proceedings."

Finally, the question is whether there can be ancillary jurisdiction of the Association's second amended and supplemental complaint derived from jurisdiction over the claims asserted by the Board in its answer and cross-claims. Webb has cited three cases (*Ferreria v. Sawayama etc.* (D.C.S.D. N.Y. 1959) 171 F. Supp. 96; *Burlingham etc. v. Luckenbach S.S. Co.* (D.C.S.D. N.Y. 1962) 208 F. Supp. 544; *Mazzella v. Pan Occania etc.* (D.C.S.D. N.Y. 1964) 232 F. Supp. 29), which hold that when there is no diversity of citizenship between the plaintiff and the defendant, jurisdiction is not established when the defendant files a third party claim wherein there is diversity between the defendant and the third party defendant. In that sort of situation the third party claim could not be filed in the first instance to establish jurisdiction. A third party claim can only be asserted by a defendant against a third party for indemnity for all or some of the relief sought by the plaintiff. By the nature of it, a third party claim is always ancillary to the main suit. The case

now under consideration is not similar. The Board's assertion of its claims is not dependent on the Board being sued first by the Association. If the Association had not sued first, the Board could have filed a complaint against the Association and the Webb defendants. The court would have jurisdiction under either 28 U.S.C.A. 1345 or 12 U.S.C.A. 1464(d)(1). In fact, it has been specifically held in this case by this Court that the Board has the power to assert the very claim now under consideration against the Webb defendants. (*Reich v. Webb* (9th Cir. 1964) 336 F. 2d 153.) If the pleadings had originated in that form, with the Board suing first and asserting its claim in a complaint, the Association could have asserted its claim against the Webbs by cross-claim. Since the Association's claim is transaction-related, there would be ancillary jurisdiction. (*Scott v. Fancher* (5th Cir. 1966) 369 F. 2d 842, 844.)

The pleadings did not take that form because the Association sued first, and so instead of filing a complaint the Board asserted its claim against the Association by answer and against the Webbs by cross-claim. In either case the substance of the situation is the same. It differs only in the form of the pleadings filed. The form of the pleadings was dictated solely by the fortuitous circumstance that when the litigation started the Webb group controlled the Association and caused the Association to file first.

Summary of Reply to Webb Brief.

There are four bases of jurisdiction as between the Association and the Webb group.

1. Original jurisdiction of the Association's claim against Webb under 12 U.S.C.A. 1464(d)(1), because the statute authorizes suit by either the Board or an association against the persons claimed to be in violation of law by the Board's statutory notice.

2. Original jurisdiction of the Association's claim against Webb under either 28 U.S.C.A. 1331 (federal question), or 28 U.S.C.A. 1337 (regulation of commerce).

3. Original jurisdiction of the remaining controversy between the Board and the Association under 12 U.S.C.A. 1464(d)(1), and ancillary jurisdiction of the Association's claim against Webb.

4. Original jurisdiction of the Board's claim against Webb and the Association under either 28 U.S.C.A. 1345 or 12 U.S.C.A. 1464(d)(1), and ancillary jurisdiction of the Association's claim against Webb as a cross-claim.

Reply to Brief Filed by Title Insurance and Trust Company.

Title Insurance and Trust Company, is, together with Eugene and Marguerite Webb, a co-trustee of the trust created by the Webbs to hold the stock of the Southland Company. Title Insurance and Trust Company was added as a party defendant by the second amended

and supplemental complaint for the purpose of facilitating the enforcement of any orders made by the court with respect to the shares of stock held in trust.

The position of the Title Insurance and Trust Company is essentially that there is no jurisdiction over it because no claim has been asserted against it by the Federal Home Loan Bank Board. Title Insurance and Trust Company was not named in the Board's notice of violation of law so as to confer jurisdiction under 12 U.S.C.A. 1464 (Title Insurance and Trust Company Brief, Argument I, pp. 6-7); and the Board's pleadings assert no claim against it so as to found jurisdiction on 28 U.S.C.A. 1345 (Title Insurance and Trust Company Brief, Argument II, p. 7).

Our position is that Title Insurance and Trust Company is a proper party as an incident to, or ancillary to, the Association's claim against Webb. It is true that this depends upon the validity of the claim against Webb, but if that claim is properly before the court, it follows that Title Insurance and Trust Company can also be joined as a proper, though formal, party so that the court can make a complete determination of the controversy between the real parties in interest.

We submit that this procedure of joining Title Insurance and Trust Company as a formal party defendant is authorized under Rule 19 of the Federal Rules of Civil Procedure which provides for joinder of parties having an interest in the litigation but who are not indispensable. Such parties are sometimes referred to

“formal” or “proper” parties. See, for example, *Baltimore and O.R. Company v. Chicago River and Indiana R. Company*, (7th Cir. 1948) 170 F. 2d 654, where the court said at page 658:

“Formal parties, or proper parties, are those who have no interest in the controversy between the immediate litigants but have an interest in the subject matter, which may be conveniently settled in the suit and thereby prevent further litigation; they may be made parties or not, at the option of the plaintiff.”

Respectfully submitted,

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No. 22,405 ✓

**United States Court of Appeals
For the Ninth Circuit**

LLOYD E. HILDEBRAND,

Appellant,

VS.

GREAT AMERICAN INSURANCE Co.,

Appellee.

**Appeal from the Judgment of the United States District Court
for the Eastern District of California**

Honorable Oliver J. Carter, United States District Judge

APPELLANT'S OPENING BRIEF

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No. 22,405

**United States Court of Appeals
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Appellant,

vs.

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**Appeal from the Judgment of the United States District Court
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Honorable Oliver J. Carter, United States District Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

The jurisdiction of the District Court is based on diversity of citizenship in a controversy involving more than \$10,000.00. The complaint alleges that appellee is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, State of New York, and that appellant is and was a citizen and resident of the State of California (Tr. 1). The complaint further alleges that the amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.00 (Tr. 1 and 2). These allegations

are admitted in paragraphs 1, 2 and 3 of the agreed statement of facts (Tr. 121). The trial court directed that its memorandum for judgment will constitute the findings of fact and conclusions of law by the court in accordance with Rule 52(a) of the Federal Rules of Civil Procedure (Tr. 183). Although the jurisdictional facts are not set forth in the memorandum of judgment, it is believed that the agreed statement of facts takes the place of formal findings of fact by the court, and that such formal findings of fact are neither necessary nor proper (*Saltonstall v. Russell*, 152 U.S. 628, 14 S. Ct. 733).

Therefore, jurisdiction exists under Title 28, Section 41, United States Code Annotated.

STATEMENT OF THE CASE

The appellant, a codefendant in the lower court, is an individual doing business under the name Valley Elevator Company (Agreed Statement of Facts, paragraph 2, Tr. 121). Appellee, plaintiff in the lower court, is an insurance company with its principal place of business in New York City, New York (Agreed Statement of Facts, paragraph 1, Tr. 121).

Prior to the accident hereafter described, Erickson Bros., a corporation, and Emmanuel Schwaub were the owners of a warehouse building located at 921 Front Street, Sacramento, California (Agreed Statement of Facts, paragraph 4, Tr. 121 and 122). Prior to the date of the accident, September 7, 1967,

appellee issued to Erickson Bros. a comprehensive multiple liability policy, which said policy was in effect on September 7, 1957 (Agreed Statement of Facts, paragraph 14, Tr. 123).

Commencing some time prior to October 1, 1956 and continuing thereafter, defendant H. C. Evans, doing business as Evans Van & Storage Company, leased from Erickson Bros. and Emmanuel Schwaub the entire warehouse building located at 921 Front Street, Sacramento, California (Agreed Statement of Facts, paragraph 5, Tr. 122). The lease was on a month-to-month basis and during the entire period of time relevant herein, H. C. Evans, doing business as Evans Van & Storage Company, had the sole right of possession to the premises (Agreed Statement of Facts, paragraph 6, Tr. 122).

Located in the warehouse building at 921 Front Street was a freight elevator which was used by H. C. Evans, doing business as Evans Van & Storage Company, in the furtherance of his warehouse business. The use of this elevator was with the express understanding that H. C. Evans, doing business as Evans Van & Storage Company, was to be responsible for the use, maintenance and inspection of said elevator (Agreed Statement of Facts, paragraph 7, Tr. 122).

H. C. Evans employed appellant to place the freight elevator in working condition and entered into an inspection service contract with appellant in connection with the use of said elevator. A copy of the inspection service contract entered into between H. C. Evans and appellant is attached to the agreed state-

ment of facts, marked "Exhibit A," and incorporated therein (Agreed Statement of Facts, paragraph 8, Tr. 122).

On September 7, 1957, at a time when H. C. Evans was in sole possession of the premises, an employee of Evans, Kasper Hardmeyer, received certain crushing injuries from the freight elevator and eventually died as the result of said injuries (Agreed Statement of Facts, paragraph 9, Tr. 122). A wrongful death action was filed in the Superior Court, Sacramento County, California, by the heirs of Kasper Hardmeyer seeking recovery for his death against Erickson Bros., Emmanuel Schwaub, and Lloyd E. Hildebrand, individually and doing business as Valley Elevator Company, among others, alleging that the death was due to the negligent operation, maintenance and control of said elevator (Agreed Statement of Facts, paragraph 10, Tr. 122). On June 20, 1960, the jury returned a verdict for the heirs against all parties in the amount of \$112,500.00, plus \$918.03 costs (Agreed Statement of Facts, paragraph 11, Tr. 122).

The liability of Erickson Bros. and Emmanuel Schwaub, the owners of the premises, in the wrongful death action was predicated solely upon their non-delegable duties as owners of the premises, and was not predicated on any affirmative acts taken by them (Agreed Statement of Facts, paragraph 12, Tr. 123).

The liability of appellant was predicated on a finding of negligence in the performance of his inspection service contract with H. C. Evans and such negligence was a proximate cause of the death of Kasper Hard-

meyer (Agreed Statement of Facts, paragraph 13, Tr. 123).

In September 1960, appellee paid \$40,000.00 to the heirs of Kasper Hardmeyer in return for a partial satisfaction of judgment and a full release and satisfaction of judgment against Erickson Bros. and Emmanuel Schwaub (Agreed Statement of Facts, paragraph 15, Tr. 123). Thereafter, appellee took an assignment from Erickson Bros. and Emmanuel Schwaub wherein appellee was assigned and subrogated to all their rights for indemnification for amounts paid on the wrongful death judgment. A copy of the "Assignment and Subrogation Receipt" is attached to the agreed statement of facts, marked "Exhibit B," and incorporated therein (Agreed Statement of Facts, paragraph 16, Tr. 123).

The present action was filed by appellee as plaintiff seeking indemnification against H. C. Evans and appellant for the \$40,000.00 paid by appellee in partial satisfaction of judgment, plus interest, costs of defense, and attorney fees incurred in the wrongful death action (Agreed Statement of Facts, paragraph 17, Tr. 123).

On June 14, 1965, appellee executed a release of its claim against H. C. Evans. Coincidentally with this release, appellee and H. C. Evans entered into an "Assignment and Covenant Not to Execute." In the latter, appellee agreed not to look to any personal assets of H. C. Evans in satisfaction of said settlement in return for an assignment by H. C. Evans of any rights which he might have against any insurance

company insuring H. C. Evans against liability arising out of the death of Kasper Hardmeyer. These two agreements are attached to the agreed statement of facts, marked "Exhibit C" and "Exhibit D" (Agreed Statement of Facts, paragraph 18, Tr. 123 and 124).

To the date of trial, appellee has received no payment under the terms of the release and assignment agreements entered into with H. C. Evans (Agreed Statement of Facts, paragraph 19, Tr. 124).

On August 15, 1966, the cause proceeded to trial against appellant only on the stipulation between appellant and appellee that the case was to be submitted for judgment upon appellee's agreed statement of facts supplemented by briefs (Docket Entry dated August 15, 1966, Tr. 226).

On June 1, 1967, the lower court entered its memorandum for judgment wherein it awarded judgment to appellee and against appellant in the sum of \$40,000.00, together with its costs of suit herein incurred (Tr. 173 to 183). The lower court further directed that the memorandum for judgment will constitute the findings of fact and conclusions of law by the court in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, and directed counsel for appellee to prepare and present a judgment in accordance therewith (Tr. 183).

A copy of the agreed statement of facts and the exhibits attached thereto are set forth in an appendix attached to this brief.

The principal question presented is whether or not appellee is entitled to indemnity from appellant for the \$40,000.00 paid by appellee on behalf of its insureds under the facts set forth in the agreed statement of facts and in the absence of a contractual or other special relationship between appellant and appellee's insureds.

A secondary question presented is the effect of the release given H. C. Evans by appellee and the assignment given appellee by H. C. Evans as the same relates to the amount recoverable from appellant.

SPECIFICATION OF ERRORS

The trial court erred in the following particulars:

1. In finding that appellee's insureds were held liable as a matter of law for the safe operation of the elevator (Tr. p. 178, li. 27 to 29).
2. In making a conclusion of law that it was appellant's duty under his inspection service contract with Evans to maintain the elevator or to maintain the elevator in a safe condition (Tr. p. 178, li. 23 and 24, and li. 29 and 30).
3. In making a conclusion of law that appellee's insureds were third party beneficiaries of appellant's inspection service contract with H. C. Evans (Tr. p. 178, li. 18 to 23).
4. In finding that the negligence of appellant in the performance of his inspection service contract with H. C. Evans resulted in the appellee's insureds'

subsequent liability to the heirs of Kasper Hardmeyer (Tr. p. 181, li. 3 to 9).

5. In finding that the negligence of appellee's insureds was passive and not affirmative (Tr. p. 180, li. 15 to 17).

6. In finding that the liability of appellee's insureds as owners of the warehouse is secondary and arises not from an active fault, but from the legal obligation that the owners have to provide a safe premises (Tr. p. 182, li. 11 to 14).

7. In finding that appellant's conduct caused the loss suffered by appellee (Tr. p. 183, li. 5 and 6).

8. In failing to make a conclusion of law that the absence of evidence of a causal connection or relationship between the negligence of appellant in the performance of his inspection service contract and the liability of appellee's insureds precludes appellee's claim for indemnity.

9. In failing to make a conclusion of law that the absence of any evidence as to the cause or causes of the accident and as to the disparity of gravity of fault or relative delinquency in the conduct of appellant and appellee's insureds with respect to said cause or causes precludes appellee's claim for recovery and implied indemnity.

10. In making a conclusion of law that California Code of Civil Procedure, Section 877(a), does not apply and, therefore, does not operate to reduce the claim of appellee against appellant in the amount stipulated in the release given H. C. Evans (Tr. p. 183, li. 10 to 16).

11. In failing to conclude from the facts as set forth in the agreed statement of facts that judgment should be entered in favor of appellant and in failing to enter judgment in appellant's favor.

ARGUMENT

THE TRIAL COURT'S FINDING THAT APPELLEE'S INSUREDS WERE HELD LIABLE AS A MATTER OF LAW FOR THE SAFE OPERATION OF THE ELEVATOR IS NOT SUPPORTED BY THE FACTS AND INCORRECTLY DESCRIBES THE LEGAL DUTY OF APPELLEE'S INSUREDS TO THE DECEASED UNDER THE AGREED FACTS AND THE LAW OF CALIFORNIA (Specifications of Error 1, 3, 5 and 6).

In its memorandum for judgment, the lower court states as follows:

"If the owners are to be held liable as a matter of law for the safe operation of this elevator, and it was Valley's contractual duty to maintain the elevator in a safe condition, then the owners were third party beneficiaries of Valley's services." (Tr. p. 178, li. 27 to 31).

The first portion of this statement is not supported by any of the facts set forth in the agreed statement and actually conflicts with these facts. Appellee's insureds, Erickson Bros. and Emmanuel Schwaub, leased "the entire premises located at 921 Front Street, Sacramento, California," to the lessee, H. C. Evans (Agreed Statement of Facts, paragraph 5, Tr. 122). During the entire period herein relevant, the tenant, H. C. Evans, "had the sole right of possession to these premises" (Agreed Statement of

Facts, paragraph 6, Tr. 122). The use of the elevator in the premises by H. C. Evans "was with the express understanding that Evans Van & Storage was to be responsible for the use, maintenance and inspection of said elevator" (Agreed Statement of Facts, paragraph 7, Tr. 122). The liability of appellee's insureds, Erickson Bros. and Emmanuel Schwaub, was predicated solely on their nondelegable duties as owners of the premises and was not predicated on any affirmative acts taken by them (Agreed Statement of Facts, paragraph 12, Tr. 123). The owner of a building who leases the entire building to a lessee and does not retain possession of any portion of the building is not liable as a matter of law for the safe operation of an elevator in the building. This proposition is supported by numerous California cases, including: *Shotwell v. Bloom*, 60 Cal. App. 2d 303, 140 Pac. 2d 728, and *Pfingst v. Mayer*, 93 Cal. App. 2d 265, 208 Pac. 2d 1002. In the *Shotwell* case, *supra*, the owner of the property leased a dairy ranch to the tenant. The plaintiffs, employees of the tenant, moved into a farmhouse located on the property. The plaintiffs lit a fire in a defective fireplace, which resulted in the house burning down and destroying plaintiffs' personal property. The Appellate Court affirmed the judgment of the trial court in favor of the plaintiffs and found that there was substantial evidence that the owner had actual knowledge that the fireplace in the house was defective at the time the property was leased to the tenant and concealed this fact from the tenant. The court found that the case falls into the

exception to the general rule that the owner is not liable to his tenant or to the tenant's invitees for injuries caused by defects in the leased premises because the defect was hidden, the owner knew about it, and the owner did not inform the tenant.

In the *Pfingst* case, *supra*, the owner of the building, Marwedel, leased the sixth floor to the tenant, Mayer. The tenant was given exclusive use of a passenger elevator and the doors to the elevator on the other floors were locked. The tenant was also to pay for all expenses in the maintenance and repair of the elevator. Otis Elevator Company entered into a "service contract" under the terms of which Otis agreed to grease and oil the elevator, make minor adjustments and furnish minor supplies. The plaintiff performed work for the tenant as an independent contractor. He embroidered names on uniforms sold by the tenant and the charges were divided. The tenant took the elevator down to the first floor and left the elevator with the outside doors open. The elevator was moved to the sixth floor by someone and the outside elevator doors at the first floor were left open. When the plaintiff returned, he walked into the open shaft, fell to the bottom and was injured. There was evidence to the effect that the only way the elevator could be moved when the first-floor outside door was open was by use of the emergency button in the elevator which should have been covered by a glass plate. The glass plate had been missing for some time prior to the accident. The trial court granted a nonsuit in favor of Otis Elevator Company and a

directed verdict in favor of the property owner, Marwedel. The plaintiff appealed, and the Appellate Court sustained the judgment of the trial court. In answer to the plaintiff's argument that the property owner should be liable for his injuries in spite of the fact that the property owner was not in control of the elevator, the Appellate Court states as follows at 208 Pac. 2d 1008:

"This argument is unsound. If it be assumed that Mayer was guilty of negligence, there is no principle of law by which Marwedel, the landlord, who was not in control of the premises, can or should be held liable. Such a holding would be contrary to the many cases generally holding that in the absence of fraud or deceit on the part of the landlord in concealing latent defects of which he has knowledge, and in the absence of a direct covenant to make repairs, the lessor is not liable to the tenant or others for injuries resulting from defects in the rented premises."

Appellant acknowledges that there are other exceptions to the general rule that when the owner leases the entire premises to a tenant, he is not liable for injuries occurring as the result of a defective condition on the premises unless the defective condition existed at the time the property was leased to the tenant and the owner knew or should have known of the defective condition. In *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 218 Pac. 2d 17, the owner leased the entire building to a tenant. When the building was leased to the tenant, the exit doors opened inward and not outward, which was a violation of a

safety ordinance of the City of Los Angeles. After the tenant moved in, he made further structural changes which resulted in the blocking off of one of the two exit doors, which was another violation of the ordinance and of which said fact the owner had knowledge. A fire started in the building and many of the employees of the tenant were injured or killed as the result of being unable to leave the burning building. In a majority opinion, the California State Supreme Court decided that when the owner knew that the tenant had altered the building in a manner which closed off one of the two exit doors in violation of a city ordinance, the owner had the duty to either terminate the tenancy or compel the tenant to comply with the ordinance. The minority opinion disagreed with the majority on this latter point.

Under the facts in this case, there is no evidence that the elevator in the building leased to H. C. Evans was altered or changed in any way or that there was any violation of an ordinance or regulation.

The trial court's finding that appellee's insureds were held liable as a matter of law for the safe operation of the elevator is not part of the facts as agreed to and, by inference, contains an erroneous conclusion of law based on the agreed facts.

THE LOWER COURT'S CONSTRUCTION OF THE INSPECTION SERVICE CONTRACT ENTERED INTO BETWEEN APPELLANT AND H. C. EVANS, AND ITS CONCLUSIONS AS TO THE RIGHTS AND DUTIES ARISING THEREFROM, ARE INCORRECT (Specifications of Error 2, 3 and 4).

The inspection service contract entered into between appellant and H. C. Evans is dated October 1, 1956 and was accepted by H. C. Evans on November 1, 1956. This inspection service contract was in effect from the date of its acceptance to the date of the accident, September 7, 1957. It is submitted that the language of this contract is clear and explicit, does not involve an absurdity, and therefore, under Section 1638 of the Civil Code of the State of California, the language of the contract should govern its interpretation.

In its memorandum for judgment, the lower court construed this inspection service contract as imposing the duty on appellant to maintain the elevator in a safe condition (Tr. p. 178, li. 29 and 30). However, the contract is devoid of any language that indicates an intention on the part of appellant and H. C. Evans that appellant was to maintain the elevator in a safe condition. Nowhere does the inspection service contract provide or even hint at a duty on the part of appellant to keep the elevator in repair or maintain the elevator in a safe condition. This agreement is substantially different from the maintenance agreements entered into by Otis Elevator Company in *Otis Elevator Co. v. Maryland Casualty Co.*, 95 Colo. 99, 33 Pac. 974, and General Elevator Co. in *Dahms v. General Elevator Co.*, 214 Cal. 733, 7 Pac. 2d 1013.

In both the *Otis Elevator Co.* and the *Dahms* cases, *supra*, the elevator companies specifically undertook in their contracts to maintain and keep the elevators in repair. In both cases, the liability of the elevator companies was predicated upon defective construction of or defective repairs made on the elevators.

It is further submitted that the lower court erred in concluding that appellee's insureds were third party beneficiaries of the inspection service contract entered into between appellant and H. C. Evans (Tr. p. 178, li. 30 and 31). As has been pointed out previously, both of the premises upon which this conclusion is based are incorrect. Appellee's insureds, the owners of the building were not held liable as a matter of law for the safe operation of the elevator. There is no such duty on the part of an owner who leases the entire building, including the elevator, to a tenant. Appellant's contractual duty under its inspection service contract with H. C. Evans was as provided in the contract itself, that is, to inspect the elevator and service it.

In order to establish that the owners of the building were third party beneficiaries of the contract, appellee must first of all establish that the inspection service contract was entered into by the parties to the contract with the intent to benefit the owners (*Woodhead Lumber Co. v. E. G. Niemann Inv.*, 99 Cal. App. 456, 278 Pac. 913). There is no evidence whatsoever in the agreed statement of facts that the inspection service contract was entered into for the benefit of appellee's insureds, the owners of the building. Rather,

paragraph 8 of the agreed statement of facts provides that appellant and H. C. Evans entered into the inspection service contract "in connection with the use of said elevator" (Tr. p. 122, li. 17). As further provided in the agreed statement of facts, "The use of this elevator was with the express understanding that Evans Van & Storage was to be responsible for the use, maintenance and inspection of said elevator" (Agreed Statement of Facts, paragraph 7, Tr. p. 122, li. 11 to 14). Under the agreed statement of facts, the inspection service contract was entered into for the benefit of those who used the elevator which, of course, included the deceased, Kasper Hardmeyer. As previously pointed out, the duties and responsibilities of appellant under its inspection service contract are of a different type and nature than the duties and responsibilities of appellee's insureds as owners of the property who have leased the entire property to a tenant. As previously pointed out, the owner of a building who is not in possession does not have the duty to inspect for defects that may arise after the tenant takes over possession (*Shotwell v. Bloom*, *supra* and *Pfingst v. Mayer*, *supra*).

THE LOWER COURT'S FINDINGS TO THE EFFECT THAT APPELLEE'S INSURED'S WERE HELD LIABLE AS THE RESULT OF SOME ACT OR OMISSION ON THE PART OF APPELLANT IS SUPPORTED BY NO EVIDENCE WHATSOEVER (Specifications of Error 4 and 7).

The findings contained in the memorandum for judgment to the effect that appellant's conduct caused the loss suffered by appellee (Tr. p. 183, li. 5 and 6),

and that the negligence of appellant in the performance of its inspection service contract with H. C. Evans resulted in appellee's insureds' subsequent liability to the heirs of Kasper Hardmeyer (Tr. p. 181, li. 3 to 9), are nowhere found in the agreed statement of facts. The agreed statement of facts does provide that the liability of appellant was predicated upon a finding of negligence in the performance of his contract with Evans Van & Storage and such negligence was a proximate cause of the death of Kasper Hardmeyer (Agreed Statement of Facts, paragraph 13, Tr. 123). Had the jury in the wrongful death case not have found that appellant was negligent in the performance of his personal service contract and that such negligence was a proximate cause of the death of Kasper Hardmeyer, the jury would not have returned its verdict against appellant; but this does not mean that appellee's insureds were found liable because of the negligence of appellant.

It is submitted that if it is proper for the lower court to make findings of fact in addition to those set forth in the agreed statement of facts, it would be far more plausible and logical to find that appellee's insureds leased the building to H. C. Evans without disclosing to H. C. Evans that the elevator had a defect of some type and that appellant's liability was based upon its failure to discover the defect. Under this hypothetical set of facts, appellant would be entitled to indemnification from appellee's insureds under the doctrine of *City and County of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 330 Pac. 2d 802, and

a number of other indemnity cases which hold that a party who is held liable for negligently failing to discover a defect is entitled to indemnity from the party who caused the defect or who is primarily responsible for its existence (*Otis Elevator Co. v. Maryland Casualty Co.*, *supra*; *Cahill Brothers, Inc. v. Clementina Company*, 208 Cal. App. 2d 367, 25 Cal. Rep. 301; *De La Forest v. Yandle*, 171 Cal. App. 2d 59, 390 Pac. 2d 52).

The fundamental point, however, is that the agreed statement of facts does not list as a fact that appellant's conduct caused the loss suffered by appellee, nor does it say that appellant's negligence in the performance of his inspection service contract resulted in appellee's insureds' subsequent liability. The lower court's findings on these two issues are based upon speculation and, as a matter of substantive law, it is difficult to imagine a situation where the property owner could be held liable for the negligence of an independent contractor employed by the tenant in the absence of actual knowledge on the part of the owner that the independent contractor had created a dangerous condition in violation of a safety ordinance, as in *Finnegan v. Royal Realty Co.*, *supra*. In the case before this court, there is no evidence that appellant made any repairs at all to the elevator, nor is there any evidence that appellee's insureds had any knowledge whatsoever of any such repairs, assuming that repairs had been made.

IN ITS MEMORANDUM OF JUDGMENT, THE LOWER COURT IMPROPERLY FINDS AS FACTS MATTERS WHICH ARE NOT INCLUDED IN THE AGREED STATEMENT OF FACTS AND WHICH, IN MOST CASES, ARE BASED UPON SPECULATION (Specifications of Error 1, 4, 5, 6 and 7).

As stated in 3 *Am. Jur.* 2d, at pages 743 and 744,

“The agreed statement of facts takes the place of the court’s findings of fact, and findings by the court are neither necessary nor proper. This means that it is ordinarily error for the court to make findings of fact in addition to the facts included in the agreed statement, except for necessary inferences from the agreed facts or matters that may be proper subjects of judicial notice.”

Yet, the lower court’s decision is based entirely upon facts that are not included in the statement of facts, that are not proper subjects of judicial notice, and that are not necessary inferences from the agreed facts. In its memorandum of judgment, the lower court found as a fact that, in the prior wrongful death case, appellee’s insureds were held liable as a matter of law for the safe operation of the elevator (Tr. p. 178, li. 27 to 29). On this point, however, the agreed statement of facts provides that the liability of appellee’s insureds “was predicated solely on their non-delegable duties as owners of the premises and was not predicated on any affirmative acts taken by them” (Agreed Statement of Facts, paragraph 12, Tr. 123). It is not a necessary inference nor even a logical inference to find as a fact that the owners of a building who are not in possession were found liable as a matter of law for the safe operation of an elevator in the building.

In its memorandum of judgment, the lower court further found that appellant's negligence in the performance of his inspection service contract with H. C. Evans "resulted" in the subsequent liability of appellee's insureds to the heirs of Kasper Hardmeyer (Tr. p. 181, li. 3 to 9). However, paragraph 13 of the agreed statement of facts does not provide this, but rather, provides that the negligence of appellant in the performance of his inspection service contract "was a proximate cause of the death of Kasper Hardmeyer" (Tr. 123). It is submitted that it is certainly not a necessary inference from the facts that because appellant was found negligent and that appellant's negligence was a proximate cause of the death of Kasper Hardmeyer, that this negligence had anything whatsoever to do with the liability of appellee's insureds. As previously pointed out, if it were proper to engage in speculation, it would be far more logical to assume that the negligence of appellant had nothing whatsoever to do with the liability of appellee's insureds. The duties each owed to the deceased, Kasper Hardmeyer, were substantially different.

The same is true of the lower court's finding that the negligence of appellee's insureds was passive and not affirmative (Tr. p. 180, li. 15 to 17). Paragraph 12 of the agreed statement of facts provides that the liability of appellee's insureds was, "predicated solely on their nondelegable duties as owners of the premises and was not predicated on any affirmative acts taken by them" (Tr. 123). This fact does not lead to a necessary inference that the negligence of appellee's

insureds was passive and not affirmative as is indicated by the authority cited by the lower court itself. In its memorandum of opinion, the lower court quotes a portion of the decision in *Cahill Brothers, Inc. v. Clementina Company*, *supra* (Tr. p. 180, li. 4 to 14). The quoted portion of this case contains the following language:

“The thrust of these cases is that if the person seeking indemnity personally participates in an affirmative act of negligence, *or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement*, he is deprived of the right of indemnity.” (Emphasis added).

The point is that the fact that appellee's insureds may not have taken any affirmative act does not necessarily raise the inference that their negligence was passive and not affirmative. Under the decision of the *Cahill Brothers, Inc.* case, *supra*, affirmative negligence includes not only affirmative acts, but a physical connection with an act or omission by knowledge or acquiescence in it. It also includes failure to perform some duty in connection with the omission which may have been undertaken by virtue of an agreement.

In its memorandum of judgment, the lower court acknowledges that its finding that the negligence of appellee's insured was passive and not affirmative is not contained in the statement of fact and is not a necessary inference from the agreed statement of facts. The court states,

“This finding *is supported* by the stipulated fact which expressly stated that the owners’ liability was based on a breach of a nondelegable duty and not on any affirmative act on their part.” (Tr. p. 180, li. 17 to 20). (Emphasis added).

The lower court further finds that the negligence of the appellee’s insureds is “secondary since it arises not from an active fault, but from the legal obligation that the owners have to provide a safe premises (Tr. p. 182, li. 12 to 14). The court quotes a portion of the decision in *Alisal Sanitary District v. Kennedy*, 180 Cal. App. 2d 69, 4 Cal. Rep. 379, which includes the following language:

“Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law, or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.” (Tr. p. 182, li. 3 to 9).

In its memorandum of judgment, the lower court concludes, “These terms are readily applicable to the facts in this action” (Tr. p. 182, li. 10 and 11). However, upon examination it is respectfully submitted that none of the terms are applicable to the facts in this action. There is no evidence that appellee’s

insureds were vicariously or secondarily liable. There is no evidence that the fault or negligence of appellee's insureds was imputed to them or was constructive, nor based on any legal relation between appellee's insureds and appellant. The liability of appellee's insureds did not arise from some positive rule of common or statutory law, but, under the statement of facts, was predicated on their failure to perform their nondelegable duties as owners of the premises. There is also no evidence that appellee's insureds were held liable for a failure to discover or correct a defect or remedy a dangerous condition caused by the act of appellant. There is no evidence whatsoever in the statement of facts that there was any causal connection between appellant's negligence and the liability of appellee's insureds.

In its memorandum of judgment, the lower court concludes with respect to appellee's insureds that, "to make them suffer the loss caused by Valley's conduct would be inequitable." As previously pointed out, the statement of facts does not contain as a fact that appellee suffered any loss whatsoever as the result of appellant's conduct.

It is respectfully submitted that all of the ultimate facts necessary in order to reach a conclusion that appellee is entitled to indemnification from appellant have been added by the lower court in its memorandum of judgment as facts in addition to those set forth in the agreed statement of facts. This is so in spite of the fact that appellee, in its reply brief filed with the lower court, objected to appellant's asser-

tion of additional facts in contradiction to additional facts asserted by appellee in its opening brief. In its reply brief, appellee states as follows: "It was the clear understanding of plaintiff (appellee) that only issues of law remain to be decided" (Tr. p. 163, li. 20 to 22).

This was appellant's understanding also. In appellant's reply brief filed with the lower court, appellant states as follows:

"Great American and Valley have submitted an agreed statement of fact; however, as will hereafter be shown, Great American makes additional factual assertions in its argument that are not contained in the agreed statement, and in one critical area, the additional 'fact' inserted by Great American is simply not true." (Tr. p. 142, li. 17 to 22).

It is respectfully submitted that it was error for the lower court to find as facts additional matters not set forth in the agreed statement of facts and to base its conclusions of law on these additional facts (*Saltonstall v. Russell, supra*).

UNDER THE AGREED STATEMENT OF FACTS, APPELLEE HAS NOT ESTABLISHED A RIGHT OF INDEMNITY AGAINST APPELLANT AS A MATTER OF LAW, AND THE JUDGMENT OF THE LOWER COURT SHOULD BE REVERSED (Specifications of Error 8, 9 and 11).

The implied indemnity cases are broken down into two basic groups, depending upon whether or not there is a contractual relationship between the two

parties. The most common example of contractual implied indemnity arises where an employer employs an independent contractor and becomes liable to a third party as the result of the negligence of the independent contractor in performing the work. In this type of situation, the employer of the independent contractor is entitled to indemnity from the independent contractor, provided that the employer did not contribute to the injury through any affirmative action (*Cahill Brothers, Inc. v. Clementina Company, supra*; *Alisal Sanitary District v. Kennedy, supra*; *San Francisco Unified School District v. California Building Maintenance Company*, 163 Cal. App. 2d 439, 328 Pac. 2d 785; *Otis Elevator Co. v. Maryland Casualty Co., supra*).

There was no contractual relationship between appellant and appellee's insureds. Even if it were found that appellee's insureds were third party beneficiaries of appellant's inspection service contract, appellee would still not be entitled to indemnity on this theory because there is no evidence that appellee's insureds were held liable as the result of any act or omission on the part of appellant.

The noncontractual implied indemnity cases are more difficult to classify or analyze. This Court has done so in the recent case of *United Air Lines, Inc. v. Wiener*, 335 Fed. 2d 379, 379 U.S. 951. The opinion in the *United Air Lines, Inc.* case has been cited with approval in *City of Sausalito v. Ryan*, 258 A.C.A. 92, 65 Cal. Rep. 391. In 335 Fed. 2d, at pages 398 and 399, this Court discusses the various situations where

noncontractual implied indemnity has been recognized. Each of the categories will be discussed separately as follows:

- (1) **Where the liability of the indemnitee is only imputed or vicarious because of a special relationship with the actual wrongdoer.**

As has been previously pointed out, this is not the situation presented in this case. There is simply no evidence at all that the negligence of appellant was imputed to appellee's insureds.

- (2) **Where the indemnitee has performed an act at the direction of the indemnitor and has incurred liability as a result.**

Appellee's insureds did not, of course, perform any act at the direction of appellant.

- (3) **Where the indemnitor has the duty to maintain safe premises and the indemnitee has failed to correct or discover the defect.**

This category is not applicable for the reason that appellant did not have the duty to maintain the elevator in a safe condition as a matter of law. Appellee's insureds did not have this duty either. Again, however, there is no evidence of any causal connection between any act or omission on the part of appellant and the liability of appellee's insureds.

- (4) **Where the indemnitor sells defective goods or makes defective repairs.**

There is no evidence that appellant made any repairs whatsoever to the elevator or that the making of repairs or the absence of making repairs resulted in the accident.

In its opinion in the *United Air Lines, Inc.* case, *supra*, this Court discusses additional situations which do not fit into any one of the above categories. In 335 Fed. 2d, at page 399, this Court states:

“Thus, indemnification of a concurrently negligent tortfeasor is said to be based upon a disparity of duties of care owed by the tortfeasors to the injured party, the doctrine of last clear chance or discovered peril, a disparity of gravity of the fault of the tortfeasors, or a combination of these.”

This presents the basic problem before this Court and explains the dilemma faced by the lower court. The facts as set forth in the agreed statement of facts are wholly inadequate to establish any disparity in the fault or duty between appellee's insureds and appellant. In all of the implied indemnity cases, the basic consideration starts with a discussion of the specific cause or causes of the accident and the respective duties of the indemnitee and indemnitor. It is submitted that before one can make an analysis of the disparity of gravity of the fault of the indemnitee and indemnitor, one first must know the specific cause of the accident and the part each played in bringing about the cause. It is submitted that it is of extreme importance that there is absolutely no evidence in this case as to what caused the accident resulting in the death of Kasper Hardmeyer. There is simply no way to consider any disparity of duties of care between appellant and appellee's insureds, or any disparity of gravity of fault between them. Was the accident caused by one defect or a combination of defects?

There is no evidence that the liability of appellee's insureds was based on imputed negligence or was constructive only. Rather, the evidence is that their liability was predicated on their nondelegable duties as owners of the premises. The agreed statement of facts does not, however, state which of these duties were violated by appellee's insureds. The same problem exists with respect to appellant. Under the evidence, appellant was found negligent in the performance of his contract. There is no evidence as to which of the duties imposed upon appellant under his inspection service contract were violated by him. The same problem is present when one attempts to analyze the disparity of gravity of the fault between appellee's insureds and appellant. As stated by this Court in the *United Air Lines, Inc.* case, *supra*, in 335 Fed. 2d, at page 399, where the offense is in no respect immoral, "it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers." The crucial fact is that there is no evidence relating to the relative delinquency of appellee's insureds and appellant. In the *City of Sausalito v. Ryan* case, *supra*, in determining that the cross-complaint stated a cause of action in implied indemnity, the court analyzed the actual acts and conduct of the parties as disclosed in the pleadings. In 65 Cal. Rep., at page 395, the court concludes, "If the *facts* prove to be as here alleged, it would seem equitable and just that implied indemnity be allowed to the City against Ryan and Kelly" (emphasis added). The appellate court did not hold that

whenever an accident happens and a third party sues the drivers of two automobiles and the City of Sausalito, the City of Sausalito is entitled to indemnity from the drivers of the two cars. Yet this is what the lower court has done in this case. Excluding the additional facts set forth in the memorandum of judgment which are not part of the agreed statement of facts, the lower court has in effect decided that whenever the employee of the lessee of a building is injured while riding on an elevator and recovers judgment against both the owner of the building and an elevator company that is servicing the elevator under an inspection service contract, the owner is entitled to indemnity against the elevator company. Such a rule is not equity; rather, it is indemnity without equity.

There is not one shred of evidence that there was any distinction between either the duties of care appellant and appellee's insureds owed the deceased or the gravity of fault.

SECTION 877 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA SHOULD APPLY TO THIS CASE, AND THE AMOUNT OF APPELLEE'S CLAIM SHOULD HAVE BEEN REDUCED BY THE AMOUNT STIPULATED IN THE RELEASE GIVEN H. C. EVANS, THE SUM OF \$40,000.00. (Specifications of Error 10).

Section 877 of the Code of Civil Procedure of the State of California provides in part as follows:

“Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before ver-

dict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort:

“(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and . . .”

A copy of the release given H. C. Evans is attached to the agreed statement of fact and marked “Exhibit C.” It also appears in the Transcript at pages 129 and 130. The release recites that it is in consideration of the sum of \$40,000.00. This release was given to H. C. Evans on June 14, 1965 and H. C. Evans gave to appellee an assignment and covenant not to execute on the same date (Agreed Statement of Facts, paragraph 18, Tr. 123).

In its memorandum for judgment, the lower court concludes that Section 877(a) of the Code of Civil Procedure does not apply because of the provisions of subsection (f), Section 875, Code of Civil Procedure, which reads as follows:

“This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another, there shall be no right of contribution between them.”

Reducing the claim against appellant by the amount stipulated in the release, \$40,000.00 does not impair appellee’s right of indemnity, but operates to reduce

the amount recoverable against appellant. Appellee does have an assignment from H. C. Evans in the amount of \$40,000.00 of all rights which H. C. Evans has against his insurance companies (Clerk's Tr., pp. 131 and 132).

Except as modified by Section 877 of the Code of Civil Procedure, the rule is that a release of one joint tortfeasor is the release of all joint tortfeasors (*Apodaca v. Hamilton*, 189 Cal. App. 2d 78, 10 Cal. Rep. 885). If Section 877 of the Code of Civil Procedure does not apply to this case, then the release given to H. C. Evans should constitute a release of appellant. If it does apply, then the claim against appellant should be reduced in the amount stipulated in the release, \$40,000.00. The lower court does recognize that if Section 877 of the Code of Civil Procedure is not applied, under the circumstances, a double recovery might be possible. The lower court states, "This decision is conditioned upon the plaintiff recovering no more than this sum from the combined sources of the defendant, Evans, or its insurers. To hold otherwise and allow a double recovery would defeat the equitable considerations in favor of indemnification" (Tr. p. 183, li. 20 to 24). However, the judgment that was entered on July 3, 1967 was not so conditioned (Tr. 185).

CONCLUSION

There is a complete absence in the agreed statement of facts of any facts as to what was wrong with the elevator, who was responsible for the defect or defects, and in what manner, or concerning the relative conduct of appellant and appellee's insureds in the premises. The agreed statement of facts does not recite that appellee's insureds were found liable as the result of any act or omission on the part of appellant or that the negligence of appellant as found by the jury in the wrongful death case was in any way imputed to appellee's insureds or constructively fastened upon them.

Appellee's insureds and appellant were all found jointly liable for the wrongful death of Kasper Hardmeyer. Although appellee seeks indemnification, it offered no evidence at the trial that appellant was in any way more culpable or more responsible for this tragic event than its own insureds, the property owners.

The entire judgment in this case is based on facts that are not part of the agreed statement of facts and conclusions of law that are erroneous. Without the assistance of these additional facts and these erroneous conclusions of law which make it appear as though appellee's insureds were held liable without fault, appellee's claim is without an equitable foundation. Appellee has not carried its burden of establishing facts that make it equitable and just that implied indemnity be allowed to appellee. Without these facts,

the allowance of implied indemnity to appellee does not constitute equity; but rather, a miscarriage of justice.

Dated, Sacramento, California,

April 1, 1968.

Respectfully submitted,

JOSEPH P. VAN DEN BERG,

Attorney for Appellant.

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH P. VAN DEN BERG

Attorney.

(Appendix Follows)



Appendix



Appendix

Cooley, Crowley, Gaither,
Godward, Castro & Huddleson
Thomas A. H. Hartwell
333 Montgomery Street
San Francisco, California
981-5252
Attorneys for Plaintiff

In the United States District Court
for the Northern District of California
Northern Division

No. Civil 8313

Great American Insurance Company,
a corporation,
vs.

Plaintiff,

H. C. Evans, doing business as Evans
Van & Storage Company, and Lloyd
E. Hildebrand, doing business as
Valley Elevator Company,
Defendants.

AGREED STATEMENT OF FACTS

The following facts are agreed and stipulated between counsel for plaintiff, Great American Insur-

ance Company, a corporation, and counsel for defendant, L. E. Hildebrand dba Valley Elevator Company:

1. Plaintiff Great American is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in New York City, New York, and is authorized to transact insurance business in the State of California.

2. Defendant, L. E. Hildebrand dba Valley Elevator Company (hereinafter Valley Elevator) is a citizen and resident of the State of California.

3. The amount in controversy is in excess of \$10,000.00.

4. Erickson Brothers, a corporation and Emmanuel Schwaub were the owners at all times herein mentioned of a warehouse building located at 921 Front Street, Sacramento, California.

5. Prior to October 1, 1956, and during the entire time herein mentioned, H. C. Evans dba Evans Van and Storage Company leased from Erickson Brothers and Schwaub the entire premises located at 921 Front Street, Sacramento, California.

6. Said lease was on a month to month basis and during the entire period of time herein mentioned Evans Van and Storage had the sole right of possession to these premises.

7. Located in the building at 921 Front Street, was a freight elevator which was used by Evans Van and Storage in the furtherance of its warehouse business. The use of this elevator was with the express understanding that Evans Van and Storage was to

be responsible for the use, maintenance and inspection of said elevator.

8. Evans Van and Storage employed Valley to place the freight elevator in working condition and entered into an inspection service contract in connection with the use of said elevator. A copy of this contract is attached as Exhibit "A" to this stipulation and incorporated herein.

9. On September 7, 1957, at a time when Evans Van and Storage was in sole possession of the premises, an employee of Evans, Kasper Hardmeyer, received certain crushing injuries from this freight elevator and eventually died as a result of said injuries.

10. A wrongful death action was filed in the Superior Court, Sacramento County, California, by the heirs of Kasper Hardmeyer, seeking to recover for his death against Erickson Brothers, Emmanuel Schwaub and Lloyd E. Hildebrand, individually, and dba Valley Elevator Company, among others, alleging that the death was due to the negligent operation, maintenance and control of said elevator.

11. On June 20, 1960, the jury returned a verdict for the heirs against all parties in the amount of \$112,500.00 plus \$918.03 costs.

12. The liability of Erickson Brothers and Emmanuel Schwaub the owners of the premises was predicated solely on their non-delegable duties as owners of the premises and was not predicated on any affirmative acts taken by them.

13. The liability of Valley Elevator was predicated on a finding of negligence in the performance of their contract with Evans Van and Storage and such negligence was a proximate cause of the death of Kasper Hardmeyer.

14. Prior to September 7, 1957, plaintiff Great American issued to Erickson Brothers a comprehensive multiple liability policy, Form SF 51721 (Pacific Coast), Number LX 46553, which policy was in effect on September 7, 1957.

15. In September, 1960, plaintiff Great American paid forty thousand dollars (\$40,000.00) to the heirs of Kasper Hardmeyer in return for a partial satisfaction of judgment and a full release and satisfaction of judgment against Erickson Brothers and Schwaub.

16. Thereafter plaintiff, Great American, took an assignment from Erickson Brothers and Schwaub, wherein plaintiff was assigned and subrogated to all their rights for indemnification for amounts paid on the wrongful death judgment. A copy of the "Assignment and Subrogation Receipt" is attached hereto as Exhibit "B" and incorporated herein.

17. The present action was filed seeking indemnification against Evans Van and Storage and Valley Elevator, for the forty thousand dollars (\$40,000.00) paid by Great American in partial satisfaction of judgment, plus interest, costs of defense and attorney fees incurred in the wrongful death action.

18. On June 14, 1965, plaintiff executed a release of its claims against Evans Van and Storage. Coincidentally with this release, plaintiff and Evans entered into an "Assignment and Covenant Not to Execute". In the latter, Great American agreed not to look to any personal assets of Evans in satisfaction of said settlement in return for an assignment by Evans of any rights which he might have against any insurance company insuring Evans against liability arising out of the death of Kasper Hardmeyer. Copies of these agreements are attached hereto as Exhibits "C" and "D".

19. To this date plaintiff, Great American, has received no payment under the terms of this release and assignment.

Cooley, Crowley, Gaither,
Godward, Castro & Huddleson
Thomas A. H. Hartwell
By Paul A. Renne, Attorneys for
 plaintiff, Great American
 Insurance Company
Joseph P. Van Den Berg
Attorney for defendant Hildebrand

Exhibit "A"

FRESNO

SACRAMENTO

VALLEY ELEVATOR COMPANY

INSPECTION SERVICE CONTRACT

Sacramento, California

To Dean Van Lines

October 1, 1956

1523 - 18th St.

Sacramento, California

We propose to furnish Inspection Service on
One Freight Elevator, State No. 1138

located at 917 Front Street, Sacramento, California from October 1, 1956 and continuing thereafter until this agreement is terminated by 30 days' written notice to that effect given in writing by either of us, for the sum of Eleven & no/100 (\$11.00) dollars per month, payable monthly. You agree to pay, as an addition to the price herein quoted, the amount of any tax based upon the transfer, use, ownership or possession of the equipment to which this proposal relates, imposed by any law enacted after the date of this proposal.

This service shall consist of a semi-monthly examination of the elevators, including lubricating and cleaning machine, motor, controller, bearings and guides; making necessary minor adjustments; emergency call back service will also be provided at any hour. The following accessory equipment is included.

Hatchway gates

Hatchway gate contact locks

In addition we will furnish the following supplies as and when necessary; carbon and copper contacts, contact insulations and contact springs; braided and cable connectors, contact holders and distance pieces for all controller, brake, governor, interlock, selector, (except commutator sides) relay panel, stopping and car switches and push buttons; lamps for signal system; motor and generator brushes; oils, greases, rope preservatives and cleaning materials.

All work is to be performed during our regular working hours of our regular working days, unless otherwise specified.

This proposal, when accepted by you below and approved by an authorized representative, together with the provisions printed on the back hereof, shall constitute the contract between us, and all prior representations or agreements not incorporated herein are superseded.

Valley Elevator Company
By L. E. Hildebrand
Approved, for Valley Elevator
Company

.....
Authorized Representative

Date.....

Accepted in Duplicate
By Evans Van & Storage
Date November 1, 1956
(By) H. C. Evans

It is agreed that we assume no liability for injuries or damage to persons or property except those directly due to our acts or omissions; and that your responsibility for injuries or damage to persons or property while on or about the elevators referred to is in no way affected by this agreement. We shall not be liable for any loss, damage, or delay caused by strikes, lockouts, fire, explosion, theft, floods, riot, civil commotion war, malicious mischief, act of God, or by any cause beyond our reasonable control, and in any event we shall not be liable for consequential damages.

Exhibit "B"

ASSIGNMENT AND SUBROGATION RECEIPT

In consideration of Great American Insurance Company's having defended each of the undersigned and indemnified them in that certain action heretofore brought in the Superior Court in and for the County of Sacramento, entitled and numbered Eva Hardmeyer, Albert Hardmeyer, Richard Hardmeyer, Robert Hardmeyer, Mary Lou Hardmeyer and Robert Hardmeyer, plaintiff, v. Valley Elevator Company, a co-partnership, Herbert Barth and Lloyd E. Hildebrand, individually and as co-partners, dba Valley Elevator Company; Dean Van Lines, Inc., a corporation; Erickson Construction Company, a corporation, Doe One, Doe Two and Doe Three, defendants, No. 115241, and pursuant to the subrogation provision of the liability policy under which said defense and said indemnification was provided, each of the undersigned hereby subrogates, assigns and transfers to the said company all of the rights, claims, demands and interests which each of the undersigned has or may have against all parties against whom each of the undersigned has or may have any right of indemnification arising out of the accident described in the complaint in said action and said company is hereby authorized and empowered to sue, compromise or settle the same in the name of each of the undersigned or otherwise, but for the sole use of said company and at its own cost, and it is further

authorized to collect and receipt for any moneys which may be paid upon said claim; to endorse in the name of each of the undersigned in its or his interest and behalf, any checks or drafts and to retain the proceeds thereof; and said company is hereby constituted the attorney in fact for each of the undersigned for said purposes and to sign releases and to execute any and all contracts, documents or releases, in the name of each of the undersigned, that may be necessary in the prosecution, litigation or settlement of said claims.

Dated this 16th day of May, 1961.

Erickson Bros., a corporation
By Laughlin E. Erickson

By /s/ Emmanuel Schwab
Emmanuel Schwab

Exhibit "C"

RELEASE

For, And In Consideration Of, the sum of Forty Thousand Dollars (\$40,000.00), the undersigned Great American Insurance Company does hereby release and discharge H. C. Evans individually, and H. C. Evans, doing business as Evans Van & Storage Company, from any and all claims in any way arising out of that certain accident occurring on or about September 7, 1957, when one Kasper Hardmeyer suffered injuries resulting in his death while riding in an elevator at certain premises being occupied by Evans Van & Storage Company.

There are included within this release, but not by way of limitation of anything hereinabove stated, any and all claims in any way arising out of the complaint on file herein in that certain civil action entitled Great American Insurance Company, a corporation, v. H. C. Evans, et al., Civil Action No. 8313, United States District Court, Northern District of California, Northern Division, including any and all claims for indemnity as to any amounts which Great American Insurance Company may have paid in connection with liability arising out of said injury and death.

It is understood and agreed that this is a compromise settlement of a disputed claim, and nothing contained herein shall be construed as admission of liability on the part of any person or party to any other person or party.

It is understood and agreed that this release includes claims which have arisen as well as those which may arise, known or unknown, suspected or unsuspected. In this connection the parties have been advised of the provisions of Civil Code § 1542, and the benefits of said section are expressly waived. Said section provides:

“Section 1542. (Certain claims not affected by general release.) A general release does not extend to claims which the creditor does not know or suspect exist in its favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

This release does not release any person or party except as named herein.

The foregoing release has been read and explained to undersigned by undersigned's counsel.

Dated: This 14 day of June, 1965.

Great American Insurance Company
By /s/ J. E. Mockett
San Francisco Regional
Claim Manager

Exhibit "D"

ASSIGNMENT AND COVENANT
NOT TO EXECUTE

Recitals

1. Great American Insurance Company, a corporation (hereafter called "Great American"), has entered into a release agreement, by way of compromise settlement, with H. C. Evans, individually, and H. C. Evans, doing business as Evans Van & Storage Company (hereafter called "Evans"), to release Evans of and from all claims and demands in any way arising out of the action of Great American Insurance Company vs. H. C. Evans, et al., Civil Action No. 8313, United States District Court, Northern District of California, Northern Division, in consideration of \$40,000.00.

2. It is the desire of the parties hereto that Evans shall assign to Great American any and all rights of Evans against any liability insurance carrier insuring as to liabilities arising in Evans by virtue of that certain accident occurring to one Kasper Hardmeyer on or about September 7, 1957 when said person suffered injuries and resultant death while riding in an elevator.

3. It is the desire of Great American in consideration of the same to enter into a covenant not to execute with Evans upon any personal assets of Evans in satisfaction of said \$40,000.00 compromise settlement of Evans, in return for said assignment from Evans to Great American of Evans' rights against each such liability insurance carrier.

Now, Therefore, It Is Agreed That:

1. Evans does hereby assign and convey to Great American any and all rights which Evans may have against any and all liability insurance carriers, which may be in any way responsible to Evans to insure against liability of Evans for the injuries and resultant death sustained by said Kasper Hardmeyer on or about September 7, 1957.

2. In consideration of the foregoing Great American does agree and covenant with Evans that it shall not execute upon any personal assets of Evans to satisfy any of said \$40,000.00 obligation incurred by Evans to Great American by virtue of the compromise settlement and release.

3. It is understood and agreed that Evans shall execute any and all documents reasonably required by Great American to further the intent of the parties, and to enable Great American to prosecute claims and necessary legal proceedings against each such liability insurance carrier of Evans to recover such amounts as said liability carriers may owe to Evans for any such liability of Evans by virtue of said accident and said compromise settlement of \$40,000.00.

Dated: This 14 day of June, 1965.

Great American Insurance Company
By /s/ J. E. Mockett
San Francisco Regional
Claim Manager

H. C. Evans
Evans Van & Storage Company
By

Filed, August 12, 1966,
James P. Welsh, Clerk.

No. 22,405

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LLOYD E. HILDEBRAND,
Appellant.

VS.

GREAT AMERICAN INSURANCE CO.,
Appellee.

Appeal from the Judgment of the United States District Court
for the Eastern District of California

Honorable Oliver J. Carter, United States District Judge

APPELLEE'S BRIEF

COOLEY, CROWLEY, GAITHER,
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FILED

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No. 22,405

United States Court of Appeals For the Ninth Circuit

LLOYD E. HILDEBRAND,

Appellant,

vs.

GREAT AMERICAN INSURANCE Co.,

Appellee.

Appeal from the Judgment of the United States District Court
for the Eastern District of California

Honorable Oliver J. Carter, United States District Judge

APPELLEE'S BRIEF

STATEMENT OF PLEADINGS

I. Jurisdiction of Court.

Appellant has appealed from the judgment of the United States District Court for the Northern District of California, Northern Division¹ awarding judgment to Great American Insurance Company in an action

¹This action was commenced on June 7, 1961, in the Northern Division of the United States District Court for the Northern District of California, situated in Sacramento, California. (Tr. 1) The matter came on to be heard on August 15, 1966, before the Honorable Oliver J. Carter, normally assigned to the Southern Division of said District situated in San Francisco. Subsequent to said hearing, but prior to the filing of Judgment, the United States District Court in Sacramento was redesignated as the United States District Court for the Eastern District of California. Since that date all papers have been filed in the Eastern District of California although the Memorandum for Judgment and Judgment are captioned in the Northern District of California.

in indemnity. (Clerk's Transcript 185, 220, hereinafter referred to as "Tr.")

Jurisdiction of the cause below was predicated on diversity of citizenship between plaintiff and defendant and an amount in controversy in excess of \$10,000.00, as provided in the provisions of Sections 1332 and 1391, Title 28, U.S.C.

The pleadings show that Appellee is a corporation organized and existing according to the laws of the State of New York, with its principal place of business in New York City and authorized to do, and doing business, within the State of California. (Tr. 1) Appellant is a citizen and resident of the State of California. (Tr. 1) The amount in controversy, exclusive of interest and costs, is in excess of \$10,000.00. (Tr. 5)

II. Pleadings.

The pleadings consist of a complaint filed by Appellee (Tr. 1-13), answer filed by Appellant (Tr. 15-17), and an Agreed Statement of Facts (Tr. 121-132).

A. Complaint.

The complaint alleged that prior to September 7, 1957, Appellant, Great American Insurance Company (hereinafter referred to as "Great American") issued to Erickson Bros., a corporation (hereinafter referred to as "Erickson"), its comprehensive multiple liability policy, Form SF 51721, Number LX 46553, and that said policy was in full force and effect on September 7, 1957. (Tr. 2)

It was alleged that Erickson and Emmanuel Schwab (hereinafter referred to as "Schwab") were the owners of a warehouse building located at 921 Front Street, Sacramento, California. Prior to October 1, 1956, Erickson and Schwab leased this warehouse building to H. C. Evans (hereinafter referred to as "Evans") on a month-to-month basis with the understanding that Evans was to be responsible for the inspection, maintenance and use of the elevator located within the building. (Tr. 2-3)

It was alleged that Evans employed Appellant to place said elevator in a working condition and thereafter entered into an agreement with Appellant for the continued maintenance of said elevator. From the date that Evans assumed occupancy of the building, the elevator was operated, controlled and maintained by Evans and Appellant. The complaint alleged that on September 7, 1957, Kasper Hardmeyer (hereinafter referred to as "Hardmeyer"), an employee of Evans, was killed while using said elevator, and in a subsequent action brought by the estate of Hardmeyer against Erickson, Schwab and Appellant, the complaint alleged that the death of Hardmeyer was due to carelessness and negligence in the operation, control and maintenance of said elevator. The action filed by the Hardmeyer estate was brought to trial and judgment on a verdict in the amount of One Hundred Twelve Thousand Five Hundred Dollars (\$112,500.00), plus costs, was entered against all defendants. (Tr. 3-4, 6)

It was alleged that Great American paid to the estate of Hardmeyer an amount of Forty Thousand Dollars (\$40,000.00) in return for a release of its insured—Erickson and Schwab—of any and all liability. Erickson and Schwab have assigned all of their rights, claims, demands and interests to Appellee. (Tr. 4)

Appellee claimed in its complaint that it had a right to be indemnified by Appellant for the Forty Thousand Dollars (\$40,000.00) paid to the estate of Kasper Hardmeyer, inasmuch as his death was due to the negligence of Appellant and that liability was imposed upon Appellee's insured only because of their non-delegable duties as the owner of the premises. In addition, it was alleged that any negligence of Appellee's insured was passive and secondary. (Tr. 4-5)

B. Answer.

Appellant filed an answer in which he admitted the execution of an agreement with Evans to conduct semi-monthly examinations and inspections of said elevator and that he was employed by Evans to place the elevator in working condition. (Tr. 6)

C. Proceedings Below.

This action came on for trial on August 15, 1966. Prior to that time, counsel entered into an Agreed Statement of Facts. (Tr. 121) This statement provided as follows:

“The following facts are agreed and stipulated between counsel for plaintiff, Great American Insurance Company, a corporation, and counsel for

defendant, L. E. Hildebrand dba Valley Elevator Company:

1. Plaintiff Great American is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in New York City, New York, and is authorized to transact insurance business in the State of California.

2. Defendant, L. E. Hildebrand dba Valley Elevator Company (hereinafter Valley Elevator) is a citizen and resident of the State of California.

3. The amount in controversy is in excess of \$10,000.00.

4. Erickson Brothers, a corporation and Emmanuel Schwaub [sic] were the owners at all times herein mentioned of a warehouse building located at 921 Front Street, Sacramento, California.

5. Prior to October 1, 1956, and during the entire time herein mentioned, H. C. Evans dba Evans Van and Storage Company leased from Erickson Brothers and Schwaub [sic] the entire premises located at 921 Front Street, Sacramento, California.

6. Said lease was on a month to month basis and during the entire period of time herein mentioned Evans Van and Storage had the sole right of possession to these premises.

7. Located in the building at 921 Front Street, was a freight elevator which was used by Evans Van and Storage in the furtherance of its warehouse business. The use of this elevator was with the express understanding that Evans Van and

Storage was to be responsible for the use, maintenance and inspection of said elevator.

8. Evans Van and Storage employed Valley to place the freight elevator in working condition and entered into an inspection service contract in connection with the use of said elevator. A copy of this contract is attached as Exhibit 'A' to this stipulation and incorporated herein.

9. On September 7, 1957, at a time when Evans Van and Storage was in sole possession of the premises, an employee of Evans, Kasper Hardmeyer, received certain crushing injuries from this freight elevator and eventually died as a result of said injuries.

10. A wrongful death action was filed in the Superior Court, Sacramento County, California, by the heirs of Kasper Hardmeyer, seeking to recover for his death against Erickson Brothers, Emmanuel Schwaub [sic] and Lloyd E. Hildebrand, individually, and dba Valley Elevator Company, among others, alleging that the death was due to the negligent operation, maintenance and control of said elevator.

11. On June 20, 1960, the jury returned a verdict for the heirs against all parties in the amount of \$112,500.00 plus \$918.03 costs.

12. The liability of Erickson Brothers and Emmanuel Schwaub [sic] the owners of the premises was predicated solely on their non-delegable duties as owners of the premises and was not predicated on any affirmative acts taken by them.

13. The liability of Valley Elevator was predicated on a finding of negligence in the performance of their contract with Evans Van and Stor-

age and such negligence was a proximate cause of the death of Kasper Hardmeyer.

14. Prior to September 7, 1957, plaintiff Great American issued to Erickson Brothers a comprehensive multiple liability policy, Form SF 51721 (Pacific Coast), Number LX 46553, which policy was in effect on September 7, 1957.

15. In September, 1960, plaintiff Great American paid forty thousand dollars (\$40,000.00) to the heirs of Kasper Hardmeyer in return for a partial satisfaction of judgment and a full release and satisfaction of judgment against Erickson Brothers and Schwaub [sic].

16. Thereafter plaintiff, Great American, took an assignment from Erickson Brothers and Schwaub [sic], wherein plaintiff was assigned and subrogated to all their rights for indemnification for amounts paid on the wrongful death judgment. A copy of the 'Assignment and Subrogation Receipt' is attached hereto as Exhibit 'B' and incorporated herein.

17. The present action was filed seeking indemnification against Evans Van and Storage and Valley Elevator for the forty thousand dollars (\$40,000.00) paid by Great American in partial satisfaction of judgment, plus interest, costs of defense and attorney fees incurred in the wrongful death action.

18. On June 14, 1965, plaintiff executed a release of its claims against Evans Van and Storage. Coincidentally with this release, plaintiff and Evans entered into an 'Assignment and Covenant Not to Execute'. In the latter, Great American agreed not to look to any personal assets of Evans in satisfaction of said settlement

in return for an assignment by Evans of any rights which he might have against any insurance company insuring Evans against liability arising out of the death of Kasper Hardmeyer. Copies of these agreements are attached hereto as Exhibits 'C' and 'D'.

19. To this date plaintiff, Great American, has received no payment under the terms of this release and assignment." (Tr. 121-124)

SUMMARY OF ARGUMENT

California law, which controls the disposition of the diversity action, specifically allows implied indemnification either on contractual or equitable grounds. Both contractual and equitable consideration justified the trial Court's holding that Appellee was entitled to indemnification.

The Agreed Statement of Facts showed that Appellant agreed to place the elevator in working condition and to inspect and service the elevator. The benefit conferred on Appellee under this Agreement was a sufficient contractual relationship to justify the application of implied indemnity when the negligent performance by Appellant of the Agreement was a proximate cause of the death of Hardmeyer.

The Agreed Statement of Facts demonstrated that Appellee was entitled to implied indemnification on equitable grounds. The facts showed that "in equity and good conscience" the burden of liability should be shifted from Appellee to Appellant. Appellee had been out of possession for almost one year; Appellee had

leased the premises with the understanding it was not to be responsible for the use or maintenance of the elevator; Appellant had agreed with the lessee to place the elevator in working condition and inspect and service the elevator on a semi-monthly basis; the death of Hardmeyer was proximately caused by Appellant's negligence, and Appellee's liability was predicated solely on its nondelegable duty as the owner of the property.

The release and dismissal of Evans is not a bar to this action. Section 877 does not apply to an action for indemnification. Additionally, the Agreed Statement of Facts shows that Appellee received no compensation for this release; thus, there has been no double recovery.

ARGUMENT

I

CALIFORNIA LAW CONTROLS THIS ACTION AND IT SPECIFICALLY RECOGNIZES THE RIGHT TO INDEMNIFICATION ON EITHER EQUITABLE OR CONTRACTUAL GROUNDS.

A. Introduction.

The central question raised by the pleadings and papers on file in the trial Court was stated by that Court to be as follows:

“The central question which is before this Court is whether the plaintiff, Great American, as assignee and subrogee of its insureds, is entitled to indemnification from defendant Valley for the amount it had paid on the judgment to the heirs of Kasper Hardmeyer, the deceased, in the absence of an agreement between these par-

ties providing for a right of indemnification. Specifically we are concerned with the problem of whether indemnity should be implied from the particular factual context of this case which admits of no explicit contractual relationship between plaintiff's insureds and the defendant." (Tr. 175)

After extensive briefing and lengthy oral argument, the trial Court answered this question in the affirmative and awarded judgment to Appellee. In awarding judgment, the trial Court held that Appellee was entitled to indemnification on both equitable and contractual grounds, although either ground alone would be sufficient to sustain a judgment for Appellee. (Tr. 173-183)

Appellant, in this appeal, does not quarrel with the question posed by the trial Court; rather, he asserts that this question was answered incorrectly, arguing that Appellee was not entitled to recover on either equitable or contractual grounds. We respectfully submit that the judgment of the trial Court was correct and should be affirmed on appeal.

B. California Law Is Controlling.

The jurisdiction of the trial Court was founded on diversity of citizenship and amount in controversy. Section 1332, Title 28, U.S.C. Accordingly, it is clear that the trial Court was required to follow the substantive law which a California state trial Court would follow. *Erie R. Co. v. Thompkins* (1938), 304 U.S. 64, 82 L. Ed. 1188. It is equally clear and requires no citation, that in this case, where all the relevant contracts

relate to California, a California trial Court would apply the California law in determining Appellee's right to indemnity.

C. California Allows Indemnification Based on Either Equitable or Contractual Grounds.

The law is well settled in California that one tort-feasor may seek and obtain indemnification from another tort-feasor provided there is either a contractual or equitable basis for such recovery. Section 875(f), Cal. Code Civil Procedure. *Cahill Brothers, Inc. v. Clementina Co.* (1962), 208 C.A. 2d 367; *De La Forest v. Yandle* (1959), 171 C.A. 2d 59; *Alisal Sanitary Dist. v. Kennedy* (1960), 180 C.A. 2d 69; *City and County of San Francisco v. Ho Sing* (1958), 51 C. 2d 127; *Lewis Avenue Parent Teachers Assn. v. Hussey* (1967), 250 C.A. 2d 232; *Cobb v. Southern Pac. Co.* (1967), 251 C.A. 2d 929.

Thus, we submit that the only issue raised by this appeal is whether or not, based on the undisputed facts in this case, Appellee had a right to indemnification under either a contractual or equitable theory. If Appellee is entitled to indemnification on either theory, the judgment must be affirmed.

II

THE TRIAL COURT WAS CORRECT IN HOLDING THAT APPELLEE WAS ENTITLED TO INDEMNIFICATION BASED ON A CONTRACTUAL RELATIONSHIP WHERE APPELLEE WAS A BENEFICIARY UNDER APPELLANT'S CONTRACT WITH EVANS.

The Agreed Statement of Facts demonstrated the existence of two separate, but distinctly related, contractual relationships. First, in leasing the premises to Evans, Appellee's insured expressly provided that Evans would be responsible for the use, maintenance and inspection of the elevator. Second, Evans in fulfilling its responsibility under the lease, contracted with appellant to place the elevator in working condition² and to inspect and service the elevator on a semi-monthly basis.

Under the principles enunciated in a number of California cases, it would appear to be clear that a right to implied indemnification would exist in favor of either Appellee's insured or Evans for any damage suffered by the breach of their respective contracts. See *Cahill Brothers, Inc. v. Clementina Co.* (1962), 208 C.A. 2d 367; *City and County of San Francisco v. Ho Sing, supra*. In *Cahill* the Court held:

"It is apparent from the foregoing cases, therefore, that the right of implied indemnity in contractual cases is based upon a breach of contract

²Appellant, throughout his entire brief ignores this aspect of the agreement and argues only that the inspection and service contract imposed no duty to correct defects. Regardless of the validity of this argument, it would seem clear that his agreement to place the elevator in "working condition" at the outset required him to correct any defects which may have existed at the time Evans took possession of the premises.

by the person against whom indemnity is sought, while in the area of noncontractual indemnity the right rests upon the fault of another which has been imputed to or constructively fastened upon him who seeks indemnity." (208 C.A. 2d 367, 379-380)

Thus, to the extent Appellee's insured was required to pay because of Evans' failure to properly use, maintain and inspect the elevator, they would have the right to indemnification based on Evans' breach of its agreement. Similarly, to the extent Evans was required to pay because of Appellant's failure to place the elevator in working condition and to properly service and inspect it, Evans would have a right to indemnification based on Appellant's breach of its agreement.³

Appellant, while apparently not disputing the above, argues that, inasmuch as there was no direct contractual relationship between himself and Appellee's insured, no contractual basis for indemnification existed. This same argument was made to the trial Court and rejected. The trial Court recognized the nonexistence of any direct contractual relationship, but found the contractual basis for implied indemnity in a third-party beneficiary analysis. Specifically, the Court held:

"In this case this requirement is satisfactorily met by recognizing that the plaintiff's insureds

³There can be no dispute that Appellant breached his agreement and that the negligent performance of his agreement with Evans was a proximate cause of Hardmeyer's death. See Paragraph numbered 13, Agreed Statement of Fact. (Tr. 123) Also, the agreement contained a clause imposing liability on Appellant for all injuries or damages directly due to his act or omission. (Tr. 126)

are third party beneficiaries of the contract between Valley and Evans and that the implied warranties which would necessarily run to Evans enure to the benefit of the owners of the warehouse as well." (Tr. 178)

We respectfully submit that the trial Court was correct in holding that this established a sufficient contractual basis for indemnification.

California specifically recognizes the existence of contracts made for the benefit of third persons and provides for the enforceability of such contracts by the third party. Section 1559, Civil Code; *Karpe v. United States* (Ct. of Claims 1964), 335 F. 2d 454; *cert. den.* 379 U.S. 964, 13 L. Ed. 2d 558. And such contracts need not specifically name the third-party beneficiary in order to allow that party to enforce them. *Spector v. National Pictures Corp.* (1962), 201 C.A. 2d 217.

However, this Court need not reach the question as to whether or not Appellee's insured could have enforced the underlying contract. The only issue is whether or not this contract, which was entered into to fulfill the agreement between Evans and Appellee's insured, provided a sufficient contractual relationship to justify indemnification.

The Supreme Court of the United States has held that the conferring of contractual benefits is a sufficient relationship to allow indemnification. *Crumady v. J. H. Fisser* (1959), 358 U.S. 423, 3 L. Ed. 413. In *Crumady v. J. H. Fisser, supra*, the Court allowed the vessel to recover indemnification from the stevedoring

company even though there had been no direct contractual relationship between the vessel's owners and the stevedoring company. In so doing the Court stated:

"The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts §133." (358 U.S. 428, 3 L. Ed. 2d 417)

Similarly, in this case the agreement of appellant to place the elevator in working condition and to periodically examine and service the elevator benefits the building owners and brings them within "the zone of modern law that recognizes rights in third-party beneficiaries."

Although there are no California cases specifically in point, we submit that California would follow the holding in *Crumady, supra*. First, California has adopted with approval the reasoning in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.* (1956), 350 U.S. 124, 100 L. Ed. 133, and *Weyerhaeuser S.S. Co. v. Nacirema Co.* (1958), 355 U.S. 563, 2 L. Ed. 2d 491, and the holding in *Ryan* was the basis, in part, for the Supreme Court's decision in *Crumady*. Second, the history of implied indemnity in California has been one of expansion and not of contraction. Compare the language in *Alisal Sanitary District, supra*, with the language in *Lewis Avenue Parent Teachers Assn. v. Hussey, supra*. Thus, the California cases

would indicate that the California courts would determine this issue in exactly the same way as it was determined by the trial Court.

Appellant, recognizing the legal validity of the trial Court's opinion, attacks this aspect of the judgment, not on the basis that California courts would not apply implied indemnification to third-party beneficiary situations; rather, he asserts that the trial Court had no factual basis for its determination. Specifically, he quarrels with the following:

“If the owners are to be held liable as a matter of law for the safe operation of this elevator, and it was Valley's contractual duty to maintain the elevator in a safe condition, then the owners were third party beneficiaries of Valley's services.”
(Tr. 178)

Appellant argues that this holding is inaccurate in two respects: One, there was no such duty on the owners and, second, it misconstrues the agreement between Evans and Appellant. Both arguments are untenable and seek to ignore the clear language of the Agreed Statement of Facts. We will deal with each separately.

A. Appellee's Insured Liability.

Appellee's insured, as owners out of possession, were held liable by the jury for the death of Hardmeyer. And this liability was predicated on their non-delegable duties as owners (Paragraph 12, Agreed Statement of Facts).

Appellant agreed that this was the basis of Appellee's insured liability. Having agreed to this fact, he

should not now be heard to argue that there were no such "non-delegable" duties and that the trial Court was in error in relying on this agreed fact.

In his brief, Appellant suggests that the basis for the owners' liability was their failure to warn Evans at the time of leasing of a defect in the elevator. Assuming *arguendo*, the accuracy of this suggestion, we fail to see how it aids Appellant's attack on the judgment. Appellee's insured, by their agreement with Evans, and Evans, by its agreement with Appellant, sought to protect themselves against any liability arising out of the use, maintenance and control of the elevator, including liability arising from a defect in the elevator at the time the premises were leased. As against a third party user of the elevator, this attempted transfer of liability would be unavailing, but it clearly provides sufficient contractual basis for implied indemnity.

B. Appellant's Agreement With Evans.

Appellant's attack on the interpretation placed on its agreement with Evans similarly seeks to avoid the clear language of the Agreed Statement of Facts. Paragraph 8 provided as follows:

"8. Evans Van and Storage employed Valley to place the freight elevator in working condition and entered into an inspection service contract in connection with the use of said elevator. A copy of this contract is attached as Exhibit 'A' to this stipulation and incorporated herein." (Tr. 122)

As has been noted previously Appellant conveniently fails to mention in this brief anything concerning his

duty to place the elevator in "working condition". At the very least, this imposed a duty on him to correct any defects which might have existed in the elevator at the time when Evans took possession of the building and to put the elevator into a safe working condition.

In addition, Appellant signed an "Inspection Service Contract" which required Appellant to examine and service the elevator on a semi-monthly basis. This contract was attached to the Agreed Statement of Fact. (Tr. 125-126) Appellant asserts that this contract did not impose any duty on it to maintain this elevator in a safe condition. We submit that Appellant's assertion in this regard is absurd. The intent of this Agreement is clear—to examine and service. Reasonable men could only assume that such examinations were to be made for the purpose of ascertaining the existence or non-existence of defects or potential defects. Whether or not Appellant then had to make the necessary repairs revealed by the examinations is irrelevant; he clearly had an obligation to advise Evans of the necessity of such repairs.

Thus, we respectfully submit that the holding of the trial Court as to Appellee's right to implied indemnity on a contractual basis, was based solely on the clear language of the Agreed Statement of Facts, and it is Appellant who now seeks to avoid this language.

III

THE TRIAL COURT WAS CORRECT IN HOLDING THAT APPELLEE WAS ENTITLED TO INDEMNIFICATION ON EQUITABLE GROUNDS.

In its argument to the trial Court, Appellant sought to defeat Appellee's right to indemnification by asserting that such right only existed where there was a special relationship between the parties and that no such relationship existed in this case. Appellant, of necessity, has now had to abandon this argument because of the recent holding in *Lewis Avenue Parent Teachers Assn. v. Hussey* (1967), 150 C.A.2d 232.⁴ In that case the Court held:

"The right of indemnity may rest upon any of several alternative grounds including an express or implied contract to indemnify, the difference between primary and secondary liability of two persons (as in one case, where a principal's liability flows from the acts of his agent), the existence of a special relationship between the parties, or other facts indicative, that in equity and good conscience the burden of the judgment should be shifted." (pp. 235-236).

A special relationship is only one of the various justifications for the application of implied, noncontractual indemnity.

⁴Equally broad in its language is the holding in *City of Sausalito v. Ryan* (1968 C.A.2d, 258 A.C.A. 92, which adopted with approval the opinion in *United Air Lines, Inc. v. Wiener* (1964) 335 F.2d 379. However, the Supreme Court of California has granted a hearing in *City of Sausalito v. Ryan*, Minutes, 68 Adv.Cal. No. 11, page 2. Thus, the decision has become "a nullity and . . . of no force or effect . . . as an authoritative statement of any principle of law therein discussed. *Knouse v. Nimocks* (1937) 8 C.2d 482, 483-484.

The keystone in the California courts' approach to implied indemnity is summed up in the above-quoted phrase "facts indicating that in equity and good conscience the burden of the judgment should be shifted." *Lewis Avenue Parent Teachers Assn. v. Hussey, supra*, p. 236. Such an approach must, of necessity, be applied on a case-by-case basis and must be based on a balancing of the equities involved.

We submit that the trial Court's judgment shifting the burden was clearly in accord with "equity and good conscience" and was based solely on the Agreed Statement of Facts.

The Agreed Statement of Facts showed that Hardmeyer was killed while using the elevator and that his death was due to negligence in the use, maintenance and control of the elevator (Paragraph No. 9). (Tr. 122) It showed that Appellee's insured had been out of possession of the premises for almost one year and that their liability for the Hardmeyer death was predicated "solely on their non-delegable duties . . . and was not predicated on any affirmative acts taken by them." (Tr. 122-123)

On the other hand, Appellant's liability was predicated "on a finding of negligence in the performance of their contract . . . and such negligence was a proximate cause of the death of Kasper Hardmeyer." (Tr. 123) In addition, the contract which was attached as Exhibit A to the Agreed Statement of Facts provided:

"It is agreed that we [Appellant] assume no liability for injuries or damage to persons or property except those directly due to our acts or

omissions; and that your responsibility for injuries or damage to persons or property while on or about the elevators referred to is in no way affected by this agreement. We shall not be liable for any loss, damage, or delay caused by strikes, lockouts, fire, explosion, theft, floods, riot, civil commotion, war, malicious mischief, act of God, or by any cause beyond our reasonable control, and in any event we shall not be liable for consequential damages." (Tr. 126)

These facts more than amply satisfy the "equity and good conscience" test for shifting the burden of judgment.

A review of a few California cases demonstrates the propriety of implied indemnification in this case. In *Alisal Sanitary District v. Kennedy* (1960) 180 C.A. 2d 69, the Court adopted the following language:

"The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence—a doctrine which, indeed, is not recognized by the common law; . . . It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured

person . . .’ (Citing examples.) And on pages 327 and 328 the court went on to say: ‘Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.’” (180 C.A. 2d 75.)

In *Herrero v. Atkinson* (1964) 227 C.A. 2d 69, the plaintiff’s wife had been struck by an automobile driven by Herrero. Eighteen months later she died while undergoing treatment for these injuries; death allegedly resulted from negligent medical care. Suit was brought against Herrero and the medical personnel and Herrero cross-complained for indemnity against the said personnel. A Demurrer to this Cross-Complaint was sustained on the grounds that there was no right to indemnification. In reversing the trial Court, the Appellate Court, while recognizing that a contract or a special relationship can give rise to a claim for indemnity went on to find that there was a further basis for indemnity,

“ . . . where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The

right depends upon the principle that everyone is responsible for the consequence of his own wrongs, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him." (227 C.A. 2d 74)

See also *City and County of San Francisco v. Ho Sing* (1958) 51 C. 2d 127; *Cahill Bros., Inc. v. Clementina Co.*, *supra*; *Cobb v. Southern Pac. Co.* (1967), 251 C.A. 2d 929.

In a case closely analogous to the case at bar, *Otis Elevator Co. v. Maryland Casualty Co.* (1934) 95 Colo. 99, 33 P. 2d 974 (cited with approval in *San Francisco Unified School District*, *supra*), the Colorado Court held that the building owner was entitled to indemnification against the defendant who had been employed to inspect and repair the building's elevator. The Court held that although the building owner owed a duty to the public to maintain a reasonably safe elevator, the owner had a right to recover from the elevator company because its negligence was the "primary cause" of the accident. In Prosser, *Law of Torts* (3rd Ed. 1964) Section 48, at page 280, it is stated:

"Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where . . . an owner of land held liable for injury received upon it sued the wrongdoer who created the hazard."

This is exactly the situation in this case.

Appellant's attempt to show that the trial Court's determination concerning Appellee's right to indem-

nification on equitable grounds was based on speculation and facts outside the Agreed Statement is unfounded. The trial Court's Memorandum for Judgment demonstrated beyond peradventure that it was based solely upon the Agreed Statement and conclusions to be drawn therefrom. It is Appellant who seeks to avoid the clear language of the Agreed Statement of Facts.

IV

THE RELEASE AND DISMISSAL OF EVANS DOES NOT BAR RECOVERY BY GREAT AMERICAN (Tr. 183).

Appellant attacks the determination of the trial Court that the release and dismissal of Evans is not a bar to this action. In so doing, Appellant cites no case law, but relies solely on the provisions of Section 877, Title 11, California Code of Civil Procedure. This reliance is not well founded. First, Title 11, of which Section 877 is a part, is not applicable to an action for indemnification. Second, even assuming its applicability, the release does not preclude recovery by Appellee in this action. We will deal with each *seriatim*.

A. Title 11 Is Not Applicable to Indemnity Actions.

Title 11, California Code of Civil Procedure is captioned "Releases From and Contribution Among Joint Tort-Fesors," and was enacted to abrogate the common law rules applied in California concerning the right of contribution between joint tort-fesors and effect of the release of one or more joint tort-fesors.

Augustus v. Bean (1961) 56 C.2d 270; cf. *Steele v. Hash* (1963) 212 C.A.2d 1. It was specifically not meant to change any rights of indemnity which existed at the time of its enactment. Section 875(f), Title 11, California Code of Civil Procedure provides:

“(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.”

Further, a reading of Section 877 itself clearly indicates its inapplicability to an action for indemnification. It clearly demonstrates that it is addressed to releases given by one suing on the tort itself, and not to one seeking indemnification. Thus, defendant's reliance on Section 877 is inapposite. The case at bar is an action for indemnity and releases pertaining to an indemnity action are controlled by other principles of law.

The right to indemnity is founded upon principles of implied in law contracts. *City and County of San Francisco v. Ho Sing* (1958) 51 C.2d 127; Notes 32 So.Calif.L.Rev. 293-299. See *Pacific Employers Ins. Co. v. Hartford* (9th Cir. 1955) 228 F.2d 365, cert. denied 252 U.S. 826, 1 L.Ed.2d 49, which held that Section 339, California Code of Civil Procedure, or the two year statute of limitations dealing with contractual liabilities, rather than the one year tort statute, governs an action by an insurer, as subrogee of an employer, to enforce implied indemnity against defendant insurer which insured the negligent em-

ployee primarily responsible. In that case the Court held:

“[This was] an action for the enforcement of a right based upon an implied contract . . . and a two-year statute of limitations would be applicable. Thus, either Neil or Pacific could have brought an action against employees prior to January 27, 1953.”

See also Restatement, Restitution Sec. 96.

Under the implied in law contract of indemnity, both Evans and Appellant became joint and several debtors to plaintiff's insured, Erickson, and, by principles of subrogation, to Appellee, when it partially discharged a judgment which was the ultimate responsibility of Appellant and Evans.

Regardless of whether the implied in law contract obligations of Appellant and Evans to Erickson to indemnify him are considered joint and several, the California law is clear that a release as to one does not in any way discharge the liability of the other, except to the extent of payment. The controlling California law on the effect of the release of one or more joint contractual debtors is found in Section 1543, Civil Code, which provides as follows:

“A release of one or two or more joint debtors does not extinguish the obligation of any of the others . . .”

This Section has uniformly been held to mean that the portion of the debt which remains unpaid after the release is still the liability of the non-released debtor. *Lovetro v. Steers* (1965) 234 C.A.2d 461, 477; *French*

v. McCarthy (1899) 125 Cal. 508. As was stated by the Court in *Lovetro v. Steers, supra*,

“(A) release of the one joint debtor does not extinguish the obligation of any of the other joint debtors to pay *so much of the debt as was not paid by the released obligor*. In other words, the release does not extinguish the *remainder of the obligation* as to the co-obligors.” (234 C.A.2d 477).

See also:

Bank of America v. Duer, 47 C.A.2d 100 (1941).

So also, where there are several, as compared to joint, obligations arising out of contract, a release of one does not operate to release another severally liable under that contract. See *In re Sanderson*, 74 Cal. 199 (1887).

B. Assuming Arguendo That Section 877 Is Applicable, It Does Not Preclude Recovery.

1. The Evans Release Does Not Stipulate That Appellee's Claim Against Appellant Should Be Reduced in Any Amount.

Section 877, California Code of Civil Procedure reads, in pertinent part, as follows:

“Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tort feorsors claimed to be liable for the same tort—

(a) It shall not discharge any other such tort feor from liability unless its terms so provide but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the

consideration paid for it whichever is the greater
 . . .”

There can be no dispute that the release, marked as Exhibit “C”, by its terms intends to release no one other than Evans. Further, there can be no dispute that Appellee has received no payment for the release. Hence, Appellant’s entire argument is premised on the asserted applicability of the language “reduce the claims against the others in the amount stipulated by the release.” But a review of the Evans release shows it contains no stipulation as to the amount by which Appellee’s claim should be reduced as to others including Appellant. On the contrary, the release expressly states that the claim against others is not to be reduced, through the language: “This release does not release any person or party except as named herein.” The amount of \$40,000 is recited to be the consideration which Appellee is entitled to receive from Evans. This is a far different thing from a stipulation by the parties to the release that Appellee’s claim against others is to be automatically reduced in such amount.

The word “stipulation” is synonymous with the word “agreement”. (See Webster’s Second Unabridged Dictionary.) A mere recital by a releasor of consideration intended to be received for a release (note that the release does not even recite that the consideration has been received) is not an “agreement” between the parties to the release that the releasor’s claims against others shall be automatically reduced in a fixed amount on execution of the release and regardless of subsequent payment.

The statute obviously was designed to permit a *tort* claimant with a claim of an unliquidated amount to agree with one of several tort-feasors obligated for the tort that his release should operate as a partial discharge of the overall liability for a fixed amount, which might be requested by the released party where the consideration given might be less. For example, this may occur in a case of disputed liability where the released party may request and obtain express agreement that he should be free to a fixed extent from potential claims of indemnity of another, in return for a small consideration. It should not be interpreted as *requiring* extinguishment of the tort claim to the extent of consideration recited which has not been paid or acknowledged received, and where the parties to the release have not stipulated to a fixed reduction of the claim against others. Such a construction would fly in the teeth of all judicial construction as to the effect of a release of a joint obligor, holding in substance that the obligation is extinguished to the extent of payment received on the consideration, unless the parties evidence a contrary intent. It would also render the provision in the release that the release should not release a third party meaningless.

See for instance *Lovetro v. Steers*, 234 C.A.2d 461 (1965); *Bank of America v. Duer*, 47 C.A.2d 102 (1941).

2. **Under Common Law, a Release of a Joint Tort-Feasor Constitutes No Bar to Action Against the Other, Where No Compensation Has Been Paid.**

It is stipulated in the agreement statement of facts that Appellee has received no payment under the release, so the entire debt is still remaining and Appellant's obligation has not been reduced by one penny.

Even when dealing with releases in tort actions, the cases hold that such releases do not bar recovery against one who was jointly liable where no payment has been made. Typical of the holding in these cases is the following language in *Shea v. City of San Bernardino*, 7 Cal.2d 288 (1944):

“The discontinuance as to one tort-feasor, of an action brought against several tort-feasors, no satisfaction having been received, does not release the others.” (7 C. 2d 694)

Or, even more pertinent is the following language in *Commercial Transfer v. Daigh & Stewart*, 33 C.A. 2d 370 (1939):

“It is the fact of compensation for the wrong complained of that operates as a release of the remaining joint tort-feasors, not the mere discontinuance as to one of them without satisfaction having been given . . .” (33 C.A. 2d 373)

See also Cf. *Oil Tool Exchange v. Schuh* (1944), 67 C.A. 2d 288, 153 P. 2d 976; *Key v. Caldwell* (1940), 39 C.A. 2d 698, 104 P. 2d 87; *Savia v. Moorehead* (1948), 83 C.A. 2d 147, 188 P. 2d 260. Similarly, in the case at bar, Appellee has received no compensation for

the release and, based on the above authority, it is free to pursue its action against Appellant.

3. **No Justification Is Presented to Support the Construction of Section 877 Now Urged by Appellant; It Would Simply Produce an Unintended Windfall, and Interfere With the Right of Parties to Settle Their Differences Amicably Before Trial.**

The only justification advanced by Appellant for his argument that Section 877 precludes recovery is the threat of possible double recovery for Appellee and double liability against Appellant. This justification will not stand the test of analysis.

Appellee's claim in indemnity against either Evans or Appellant must be reduced by the actual payment received from either. Cf. *Lovetro v. Steers* (1965), 234 C.A. 2d 461, 477; *French v. McCarthy* (1899), 125 Cal. 508; *Laurenzi v. Vranigan* (1945), 25 C. 2d 806, 155 P. 2d 633; *Magee v. Wyeth Laboratories* (1963), 214 C.A. 2d 340, 358-359. To the extent that Appellee recovers payment on a judgment against Appellant, it cannot recover on its release from Evans under the common law rule that payment from one joint or several debtors works a pro tanto release of the other. Thus, the threat which Appellant poses is nonexistent and there is no justification in law or in equity to deny recovery to Appellee because of its release of Evans.

The law should be construed in a manner which fosters the amicable settlement of disputes before judgment. It would result in extreme hardship if a party to litigation were prevented from settling his case against one defendant desiring settlement for fear

that consideration recited, but may not be collectible, would to that extent discharge the liability of another. The case at bar should be treated in the same manner as if Erickson had obtained a judgment against both Appellant and Evans, in which case their joint liability to Erickson would only be discharged to the extent of payment of such judgment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the trial Court should be affirmed.

Dated, San Francisco, California,
May 24, 1968.

COOLEY, CROWLEY, GAITHER,
GODWARD, CASTRO & HUDDLESON,
THOMAS A. H. HARTWELL,
PAUL A. RENNE,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL A. RENNE,
Attorney for Appellee.

No. 22,405

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LLOYD E. HILDEBRAND,

Appellant,

vs.

GREAT AMERICAN INSURANCE CO.,

Appellee.

Appeal from the Judgment of the United States District Court
for the Eastern District of California

Honorable Oliver J. Carter, United States District Judge

APPELLANT'S REPLY BRIEF

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**Appeal from the Judgment of the United States District Court
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Honorable Oliver J. Carter, United States District Judge

APPELLANT'S REPLY BRIEF

SUMMARY OF ARGUMENT

Appellant does not argue that the right to implied indemnity does not exist as a principle of law nor that recovery should not be allowed where the facts support a decision that such indemnity is equitable and just. Rather, appellant argues that under the facts set forth in the agreed statement, appellee's right to indemnity is not established and that the lower court was in error in granting judgment in favor of appellee.

It is noteworthy that appellee does not discuss the facts of the cases cited by it in its reply brief;

but rather, discusses general principles that have been employed by courts in deciding implied indemnity cases. Neither does appellee discuss or point out in what manner the facts of the cases cited by it are analogous to the facts set forth in the agreed statement. Appellee gives the impression that the specific facts of the cases cited by it are not of significance. In doing so, appellee eliminates the necessity of making the fundamental inquiry, that recovery be equitable and just, and substitutes an algebraic formula.

ARGUMENT

APPELLEE ARGUES THAT ITS LIABILITY WAS IN SOME WAY PREDICATED ON APPELLANT'S NEGLIGENCE, BUT WHERE ARE THE FACTS?

A classic example of the technique employed by appellee appears at page 13 of its reply brief. Appellee states as follows:

“Similarly, to the extent Evans was required to pay because of Appellant’s failure to place the elevator in working condition and to properly service and inspect it, Evans would have a right to indemnification based on Appellant’s breach of its agreement.”

In order for this statement to have any relevance to this case, one must first assume that Evans’ liability to the plaintiff is based or predicated on appellant’s negligence and not on Evans’ own negligence. However, in its amended complaint, appellee alleges negligence in the operation and control of the elevator, as well as in maintenance (Tr. 52). One thing is

for certain, and that is that appellant had nothing to do with the operation or control of the elevator. What facts are there that would support a conclusion that appellee's liability was predicated on appellant's negligence rather than Evans' negligence in the operation or control of the elevator? Since appellee cannot point to any act or omission on the part of appellant that resulted in appellee's being found liable, appellee skirts the problem by phrasing its arguments in a manner that just assumes they exist.

Another example appears at page 18 of appellee's reply brief, where appellee states as follows:

"Reasonable men could only assume that such examinations were to be made for the purpose of ascertaining the existence or non-existence of defects or potential defects. Whether or not appellant then had to make the necessary repairs revealed by the examination is irrelevant; he clearly had an obligation to advise Evans of the necessity of such repairs."

What repairs is appellee talking about? What evidence is there that appellant discovered some defect and neglected to tell Evans about it? As is pointed out in appellant's opening brief, it is just as plausible for appellant to argue that appellee's liability was predicated on its failure to notify Evans of a latent defect which was known to exist, and that appellant's liability was predicated on a failure to discover it. One argument is just as good as the other as neither is supported by the evidence.

Appellee's entire argument based on a theory of recovery as third party beneficiary assumes that the

accident was caused solely by some act or omission on the part of appellant. This same assumption is made throughout appellee's argument concerning non-contractual implied indemnity.

Appellee cites *Otis Elevator Co. v. Maryland Casualty Co.* (1934), 95 Colo. 99, 33 Pac. 2d 974, and asserts that this case is "closely analogous to the case at bar" (Appellee's Reply Brief, p. 23). Appellee does not allege that the facts are closely analogous because upon reading the *Otis Elevator Co.* case, *supra*, it is apparent that the facts are not analogous. Among other things, the property owner in the *Otis Elevator Co.* case was in possession of the elevator and employed the elevator company to construct, repair and maintain the elevator. As a result of defective construction, the hoisting cables of the elevator pulled out from their anchors on the cage of the elevator, and the safety devices also failed to work. The elevator fell and various people were injured. The insurance company for the property owner paid various claims and then sued the elevator company for indemnification. The trial court found for the insurance company and the elevator company appealed. Among other things, the appellate court found that, "Under the contract of employment with its implied warranties, Oil Exchange Building had the right to recover from Otis for its negligence as the primary cause of the accident." (33 Pac. 2d 978).

Appellee does not discuss the facts of the *Otis Elevator Co.* case, *supra*. It asks this court to assume that the case is analogous and that the result should be the same.

At page 23 of appellee's reply brief, appellee cites Prosser, *Law of Torts* (3rd Ed. 1964), Section 48, at page 280, as follows:

"Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where . . . an owner of land held liable for injury received upon it *sued the wrongdoer who created the hazard.*" (Emphasis added).

Then appellee states, "*This is exactly the situation in this case.*" (Emphasis added).

Where is the evidence that appellant created any hazard?

Why must this court assume, as appellee insists, that appellant created a hazard and appellee was liable solely as the result of this hazard? Why must this court assume, as the lower court has done, that whatever caused the accident was the primary fault of appellant and the liability of appellee was only secondary? Why should this court assume or infer, as urged by appellee and as was done by the trial court, that the gravity of appellant's fault is serious, such as the failure to warn of a dangerous defect in the elevator which was known to appellant, rather than something far less serious such as the failure to detect a hidden defect of a type which an inspection, if made with due care, would still disclose?

Why is it reasonable to assume or infer that the gravity of fault of appellee's insureds is so slight as to be almost nonexistent liability as a matter of law

for the safe operation of the elevator? Why is this assumption or inference more correct and proper than an assumption or inference that appellee's insureds' liability was predicated on their failure to warn Evans of a known latent dangerous defect?

It is respectfully submitted that these questions cannot be answered from the evidence set forth in the Agreed Statement of Facts and which was the only evidence before the trial court.

CONCLUSION

What the appellee is really arguing, and the actual result of the decision of the lower court, is that in all cases where the lessor and owner of a building and an elevator company which is servicing the elevator under an inspection service contract are found jointly liable as the result of an accident occurring on the elevator, the lessor and property owner is entitled to indemnity from the elevator company; and that this result should be reached regardless of the absence of evidence of any causal connection between the negligence of the elevator company and the liability of the property owner and regardless of the lack of any evidence indicating a disparity of the gravity of the acts or omissions of each. Appellee argues, and the lower court has, in effect, decided, that equity and justice do not require an analysis and comparison of the seriousness of the acts or omissions of the parties or of the legal duties each violated; but rather, only requires a determination

of the general status or relationship each party had with respect to the elevator. If one party is an elevator company servicing the elevator under an inspection service contract with the tenant, and the other party is the owner and lessor of the property, then the property owner is entitled to indemnity, and whatever facts are otherwise necessary to support this result may be assumed or inferred from the general circumstances.

Wherefore, it is respectfully submitted that the judgment of the trial court should be reversed.

Dated, Sacramento, California,
July 18, 1968.

Respectfully submitted,
JOSEPH P. VAN DEN BERG,
Attorney for Appellant.

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH P. VAN DEN BERG,
Attorney.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLINTON H. MITCHELL and
CLINTON MITCHELL FOUNDATION,

Appellants

v.

R. A. RIDDELL, District
Director of Internal Revenue,

and

UNITED STATES OF AMERICA,

Appellees

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WM. B. LUCK, CLERK

ON APPEAL FROM
THE ORDERS OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22406

CLINTON H. MITCHELL and
CLINTON MITCHELL FOUNDATION,

Appellants

v.

R. A. RIDDELL, District
Director of Internal Revenue

and

UNITED STATES OF AMERICA,

Appellees

ON APPEAL FROM
THE ORDERS OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court's order denying the appellants' motion for summary judgment (I-R. 56-57) 1/ and its order granting the Government's motion to dismiss (I-R. 58-62) are not officially reported.

1/ "I-R. " and "II-R. " references are to Vols. 1 and 2 of the record on appeal.

JURISDICTION

This appeal relates to federal income taxes in that the appellants seek to secure a declaratory judgment decreeing that the Clinton Mitchell Foundation qualifies as a tax-exempt organization. On October 5, 1967, the District Court entered an order denying appellants' motion for summary judgment and an order granting the Government's motion to dismiss the action. Within sixty days thereafter, on October 25, 1967, appellants filed their notice of appeal. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether under the circumstances of this case the appellants are entitled to a declaratory judgment under Section 2201 of 28 U.S.C. determining that the Clinton Mitchell Foundation qualifies as a tax-exempt organization for federal tax.

STATUTES INVOLVED

28 U.S.C. :

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Internal Revenue Code of 1954:

SEC. 7422 [as amended by Sec. 3(a), Act of November 2, 1966, P. L. 89-713, 80 Stat. 1107]. CIVIL ACTIONS FOR REFUND.

*

*

*

(f) Limitation on Right of Action for Refund. --

(1) General rule. --A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue).

*

*

*

(26 U.S.C. 1964 ed., Sec. 7422.)

SEC. 7423. REPAYMENTS TO OFFICERS OR EMPLOYEES.

The Secretary or his delegate, subject to regulations prescribed by the Secretary or his delegate, is authorized to repay--

(1) Collections recovered. --To any officer or employee of the United States the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also

(2) Damages and costs. --All damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of anything done in the due performance of his official duty under this title.

(26 U.S.C. 1964 ed., Sec. 7423.)

STATEMENT

The appellant Clinton H. Mitchell is the creator and controlling trustee of the Clinton Mitchell Foundation and is empowered to represent such foundation. (I-R. 2, 32, 50-51.)

On April 14, 1967, Clinton H. Mitchell filed a complaint (I-R. 2-5) in the court below setting forth two causes of action.

The first sought to recover the sum of \$10 with interest alleged to have been overpaid by the Clinton Mitchell Foundation. The payment of this sum was made voluntarily (I-R. 60) and it was purportedly tendered "as partial payment on any tax for which you may hold us accountable" (see letter dated May 17, 1966 (I-R. 13)). The payment of \$10 was apparently made in anticipation of possible future assessments of the Internal Revenue Service, and was clearly not made in payment of a then existing liability. (I-R. 52.) By his second cause of action the appellant Mitchell sought to obtain what amounts to a declaratory judgment decreeing that the Clinton Mitchell Foundation qualifies as a tax-exempt organization.

On July 14, 1967, the Government filed a motion to dismiss (I-R. 8-15) Mitchell's complaint on the grounds of (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the defendant, R. A. Riddell, District Director, Internal Revenue Service ^{2/}; (3) failure to state a claim upon which relief may be granted; and (4) lack of jurisdiction over the plaintiff. Thereupon Clinton H. Mitchell filed a notice of opposition and an opposition to the Government's motion to dismiss (I-R. 16-17, 19-30) and a hearing on the motion took place on August 14, 1967.

At the above referred to hearing it was established that this action seeking a refund of \$10 purportedly paid as federal taxes was in the nature of an action for declaratory judgment which action

^{2/} At the time of the commencement of this action Mr. Riddell had ceased to be District Director of Internal Revenue and had retired from such position and the service of the Government. (I-R. 58.)

is interdicted by 28 U.S.C., Section 2201. (II-R. 3.) Accordingly, the trial court dismissed the action on the condition that the Government refund to Clinton H. Mitchell, the sum of \$10. In this regard the Internal Revenue Service was contacted and instructed to comply with the order. (II-R. 14.)

Following this hearing and as a result thereof, the court below on August 25, 1967, approved a stipulation between the parties that the Clinton Mitchell Foundation may be joined with Clinton H. Mitchell as plaintiff. This joinder took place on a showing that Clinton H. Mitchell was the real party in interest. (I-R. 32.)

In the meantime and before the \$10 could be refunded to him, Clinton H. Mitchell and the Clinton Mitchell Foundation filed on September 13, 1967, a document entitled "Plaintiff's Motion for Summary Judgment and Mandate" (I-R. 33-36) wherein they prayed the court to "approve this motion: that his charitable foundation be held tax exempt for herein period, and that such condition continue to apply during such time as he remain in compliance with pertinent and applicable codes and laws" (I-R. 35-36). To this motion the Government filed an opposition (I-R. 37-40) setting forth among other things that "this action, for the refund of Federal taxes in the amount of \$10.00, is in the nature of an action for declaratory judgment, which action is interdicted by Title 28, U.S.C., §2201" (I-R. 39).

Thereafter, or on September 29, 1967, the parties entered into a stipulation which after reciting that the plaintiffs had brought the instant action for a refund of federal taxes in the amount of

\$10, "which amount is not, and never has been, the subject matter of an assessment against the plaintiffs, either individually or jointly" and that "the defendant has agreed to refund to plaintiff Clinton Mitchell" such sum "receipt of which amount is hereby acknowledged by said plaintiff" then provided: "1. Plaintiff Clinton Mitchell has been refunded the amount of ten and no/100 dollars (\$10.00) referred to above; 2. Plaintiffs and defendant agree that the acceptance of said amount by Clinton H. Mitchell shall not be construed to preclude a later assertion that the Clinton Mitchell Foundation is a tax-exempt organization; 3. Plaintiffs and defendant agree that payment of said amount by defendant shall not be deemed to constitute an admission that the Clinton Mitchell Foundation is a tax-exempt organization." (I-R. 52-53.)

Thereafter, or on October 5, 1967, the court below on the basis of the above facts and proceedings entered an order denying the plaintiffs motion for summary judgment, stating that inasmuch as the plaintiffs are here seeking to secure declaratory relief with respect to taxes which is not permitted by Section 2201 of 28 U. S. C. , their motion must be denied. (I-R. 56-57.) On the same day, the court below entered an order granting the Government's motion to dismiss, noting that it had no jurisdiction of the subject matter of the action in view of the payment of the sum of \$10 to Clinton H. Mitchell by the Government. (I-R. 58-62.) Whereupon, the plaintiffs below appealed to this Court. (I-R. 63.)

SUMMARY OF ARGUMENT

The sole issue remaining in this action is whether appellants are entitled to a declaratory judgment determining that the Clinton Mitchell Foundation qualifies as a tax-exempt organization for federal tax purposes. It is clear that the instant action is "with respect to Federal taxes" and accordingly under the specific terms of Section 2201 of 28 U. S. C. , the courts have no jurisdiction to enter declaratory judgments. Moreover, even if Section 2201 permitted a declaratory judgment in some tax cases, which indisputably it does not since no assessment for income taxes has yet been levied against the Foundation, there is no "actual controversy" between the appellants and the Government in the instant case as is required for a declaratory judgment under Section 2201. Accordingly, since the first cause of action set forth in Clinton H. Mitchell's complaint has become moot, the District Court properly denied his and the Clinton Mitchell Foundation's motion for summary judgment which was used as an instrumentality in an effort to obtain the prohibited declaratory judgment which was the obvious objective of Mitchell's second cause of action of his complaint.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT CLINTON H. MITCHELL'S AND THE CLINTON MITCHELL FOUNDATION'S MOTION FOR SUMMARY JUDGMENT MUST BE DENIED SINCE THEY WERE SEEKING TO OBTAIN THROUGH THE INSTRUMENTALITY OF THAT MOTION A DECLARATORY JUDGMENT DETERMINING THAT THE FOUNDATION QUALIFIES AS A TAX-EXEMPT ORGANIZATION FOR FEDERAL TAX PURPOSES, A RESULT INTERDICTED BY SECTION 2201 OF 28 U.S.C.

In his complaint filed in the court below in this case, Clinton H. Mitchell sought, first, to recover the sum of \$10 and interest thereon, which sum he had voluntarily paid to the appellee Riddell "as partial payment on any tax for which you may hold us accountable" (I-R. 13) and, second, to obtain what amounts to a declaratory judgment decreeing that the Clinton Mitchell Foundation, which was created by him, qualifies as a tax-exempt organization for federal tax purposes. After the commencement of this action and a hearing on the Government's motion to dismiss the Government voluntarily repaid the sum of \$10 to Mitchell. A stipulation executed by the parties hereto subsequent to this repayment discloses that Mitchell admits that he has now received a refund of the \$10; that he has waived any statutory interest thereon; and that such payment and receipt will have no effect upon any subsequent determination concerning the tax-exempt status or lack of tax-exempt status of the Clinton Mitchell Foundation, if such subsequent determination in fact be made.

In its order of October 5, 1967, the court below allowed the Government's motion to dismiss. In so doing the court properly

pointed out (I-R. 60-61): "It is clear that this action should be dismissed for lack of jurisdiction in the Court over the subject matter of the action where, as here, there is no longer pending before the Court the right of plaintiffs to recover the Ten Dollars (\$10.00) heretofore voluntarily paid by plaintiffs to the Internal Revenue Service plus interest thereon. Plaintiffs have received such Ten Dollar sum and have waived interest thereon".

From the foregoing and from what we set forth below, it is clear that the District Court properly allowed the Government's motion to dismiss. It is obvious that the complaint's first cause of action became moot and is no longer in the case.

But aside from the original claim of Mitchell set forth in the first cause of action of his complaint seeking a refund of \$10, which claim as pointed out above has been satisfied by the voluntary payment of that sum to him by the Government, Mitchell in accordance with the purport of his second cause of action referred to above also seeks through the instrumentality of a pleading termed "Plaintiff's Motion for Summary Judgment and Mandate" what amounts to a declaratory judgment under Section 2201 of 28 U. S. C., supra, decreeing that the Clinton Mitchell Foundation qualifies as a tax-exempt organization for tax purposes. Section 2201 reads:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

But it is clear from reading the above statute that the declaration with respect to federal taxes which Mr. Mitchell is seeking is expressly interdicted by its terms and that the District Court was correct in denying his and the Foundation's motion for summary judgment and dismissing, as noted above, the entire action on the ground that the court now had no jurisdiction of the subject matter of his suit. Moreover, it appears from the stipulation of the parties, and from the admissions of Mitchell in open court, that no assessment for federal income taxes has ever been levied against the Foundation. Therefore, even if Section 2201 permitted the entering of a declaratory judgment in some tax cases, which it clearly does not, at the present time, no "actual controversy" exists between the appellants and the Government as required for a declaratory judgment under Section 2201 of 28 U.S.C. Aralac, Inc. v. Hat Corp. of America, 166 F.2d 286 (C. A. 3d, 1948).

The issue in this case is almost identical to the one in Jolles Foundation v. Moysey, 250 F.2d 166 (C. A. 2d, 1957). In that case the Foundation brought action against the District Director of Internal Revenue for an order that the District Director had wrongfully excluded the plaintiff Foundation's name from the list of organizations entitled to the privilege of exemption from federal taxes. The District Court dismissed the complaint for lack of jurisdiction and the Foundation appealed. The Second Circuit stated (p. 169):

No tax has been assessed against the Foundation or even threatened. Thus there is no actual controversy between the Foundation and the District Director.

* * *

* * * the Foundation's action is "with respect to Federal taxes." In this field the courts have no jurisdiction to enter declaratory judgments. Taylor v. Allan, 10 Cir., 1953, 204 F.2d 485; Noland v. Westover, 9 Cir., 1949, 172 F.2d 614, certiorari denied 337 U.S. 938, 69 S. Ct. 1515, 93 L. Ed. 1744; Wilson v. Wilson, supra.

In addition to Noland v. Westover, 172 F.2d 614 (1949),

decided by this Court and cited by the Second Circuit in the above quotation, see also two other decisions of this Court, namely,

Mayer v. Wright, 251 F.2d 178 (C. A. 9th, 1958), and Martin v.

Andrews, 238 F.2d 552 (C. A. 9th, 1956). Also in accord with the

Second Circuit's observation in the Jolles case, supra, are:

United States v. Teitelbaum, 342 F.2d 672 (C. A. 7th, 1965);

Sweeney v. United States, 285 F.2d 444 (Ct. Cl., 1961); England

v. United States, 261 F.2d 455 (C. A. 7th, 1958); Carmichael v.

United States, 245 F.2d 676 (C. A. 5th, 1957); Wilson v. Wilson,

141 F.2d 599 (C. A. 4th, 1944); Kyron Foundation, Inc. v. Dunlap,

110 F. Supp. 428 (C. A. D. C., 1952).

In reaching its conclusion that it was without jurisdiction

to enter a declaratory judgment with respect to the exempt status

for federal tax purposes of the Foundation involved in Jolles, supra,

the Second Circuit also noted that the policy behind Section 2201,

not allowing declaratory judgments with respect to federal tax

matters, is sound. The court stated (p. 169):

His [the Commissioner's] duty is to decide whether the particular activities submitted to him justify exemption. He cannot be foreclosed by declaratory judgment from reviewing the purposes and activities of applicants for exempt status when and as they are presented to him for decision. The Foundation's own case illustrates the situation. In 1947 the facts

warranted exemption; in 1952 a changed purpose brought termination. Its history and activities in 1954 did not produce any change of ruling but the Foundation may still avail itself of the right to show any change of activities and again seek exemption. A declaratory judgment upon the facts here set forth would serve no purpose. (Emphasis supplied.)

In the instant case, taxpayers' appeal is entirely based upon their contention that Section 2201 of 28 U.S.C., and Sections 7422(f)(1) and 7423 of the Internal Revenue Code of 1954, supra, are unconstitutional. A declaratory judgment, authorized by Section 2201 of 28 U.S.C., is not a constitutional right as taxpayers indicate, but a procedural remedy created by statute. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937); Aralac, Inc. v. Hat Corp. of America, 166 F.2d 286 (C. A. 3d, 1948). In England v. United States, 164 F. Supp. 322 (E.D. Ill., 1958), affirmed, 261 F.2d 455 (C. A. 7th, 1958), the court stated (p. 323):

Declaratory judgments are a creature of statute and, therefore, may be pursued only in accordance with the provisions of that statute. Section 2201, Chapter 28 U.S.C.A., makes provision for declaratory judgments.

The court further stated (p. 324):

The plaintiffs have no standing to proceed under the declaratory judgment act since that act specifically excludes controversies concerning federal taxes and it is upon a claim concerning federal taxes that this complaint is based.

In Jolles, supra, the Foundation there involved strenuously made for all intents and purposes the same argument that the appellants are making here with respect to the constitutionality of Section 2201. In rejecting this contention the Second Circuit said (pp. 169-170):

The Foundation has been deprived of no constitutional rights despite its elaborate arguments to the contrary. If a tax is assessed both the Foundation and prospective donors are afforded appropriate procedural remedies to test the exempt nature of the organization upon the facts as they then may exist.

The taxpayers in this case are not being denied judicial review as they assert. (Br. 5-6.) Sections 7422(f)(1) and 7423 of the 1954 Code in no way deprive a taxpayer of any redress he may have for any alleged wrong to him; they simply state that his suit shall be against the United States rather than the officer, employee, or personal representative of the United States who personally administered the law. As the Court pointed out in Jolles Foundation v. Moysey, supra (p. 170), if a tax is assessed against the Foundation, appropriate procedural remedies are available to test the exempt nature of the organization upon the facts as they existed at the time the tax accrued. In an analogous situation the Supreme Court long ago pointed out (Snyder v. Marks, 109 U.S. 189 (1883)):

The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law. * * * In Cheatham v. United States, 92 U.S. 85, 88, and again in State Railroad Tax Cases, 92 U.S. 575, 613, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would

subject itself to the judgment of the courts in the collection of its revenues.

And again more recently in United States v. Sherwood, 312 U.S. 584, 586 (1941), the Court observed:

The United States, as sovereign, is immune from suit save as it consents to be sued, United States v. Thompson, 98 U.S. 486; United States v. Lee, 106 U.S. 196; Kansas v. United States, 204 U.S. 331; Minnesota v. United States, 305 U.S. 382; Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388; United States v. Shaw, 309 U.S. 495 (see cases cited in The Pesaro, 277 F. 473, 474, *et seq.*), and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.

The procedures applicable currently are explicitly set forth in Internal Revenue Service Publication No. 183 (formerly Form 1717), revised September, 1954, p. 36,022:

Appellate Rights

The Internal Revenue Service does not have the final word as to whether an organization is exempt under section 501 of the Internal Revenue Code of 1954 and corresponding provisions of prior revenue laws. Where the Service denies exemption under section 501 of the Code and asserts that a tax is owing, its determination may be appealed to one of several courts. The appeal may be taken either by the organization which is ruled taxable, rather than exempt, or by a person who asserts his right to deduct contributions made. In either event, appeal to the courts may be made by either of the following procedures: The organization, or a person who has made a contribution to an organization claiming to be exempt under section 501(c)(3), may pay the disputed tax liability and then bring an appropriate suit for refund in a United States District Court or in the United States Court of Claims. On the other hand, the organization, or person who has made the contribution, has the right under existing law to appeal a proposed income tax deficiency prior to paying the tax, in which case an appeal is taken to the Tax Court of the United States. In the event of such a proposed deficiency (or proposed disallowance of a claim for refund), the taxpayer has the usual

rights of informal and formal conferences in the field offices of the Internal Revenue Service. An adverse decision rendered by a District Court, the Court of Claims, or the Tax Court may be appealed to a higher court in such cases as in other tax controversies.

It is obvious that if the Internal Revenue Service should undertake to assert an income tax against the Foundation herein on the basis it is not tax exempt and if the Foundation follows the procedure outlined above, then every possible right accruing to its benefit will be amply protected.

CONCLUSION

For the reasons stated above, the orders of the District Court were correct and should be affirmed.

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February, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 19th day of February, 1968.

/s/ Jerry R. Stern
Asst. U.S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

□ □ □

JOSEPH K. CHANDLER,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,

Appellee.

No. 22408 ✓

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRUCIT

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JOSEPH K. CHANDLER,

Appellant,

vs.

No. 22408

UNION OIL COMPANY OF CALIFORNIA,

Appellee.

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

Appellant JOSEPH K. CHANDLER filed a complaint under appellee UNION OIL COMPANY OF CALIFORNIA under the Federal antitrust laws, specifically under Title 15, U.S.C., Sections 15 and 26, being part of an act of the Federal Congress commonly known as the Sherman and Clayton Acts which vests in the District Court jurisdiction of suits by any person injured in his business or property by reason of anything forbidden in the antitrust laws.

The plaintiff-appellant appeals from an Order Denying Motion for Preliminary Injunction filed November 28, 1967. Clerks REcord at 113, Chandler v. Union Oil Co., Docket No. 7961 (hereinafter cited as R.) The courts of the United States

may grant injunctive relief under the antitrust laws. 15
U.S.C. Sec. 26 (1964). Courts of Appeals have appellate
jurisdiction of interlocutory orders of the District Courts
of the United States refusing injunctions, as follows:

A. The court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the District courts of the United States ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court ..." 28 U.S.C. Sec. 1292 (1964)

STATEMENT OF THE CASE

A. Statutes Involved

Appellant invoked Sections One and Two of the Sherman Act, 15 U.S.C. Secs. 11 & 2 (1964), and Sections 4 and 16 of the Clayton Act, id., Secs. 15 & 26, in seeking (a) a permanent injunction preventing UNION OIL COMPANY from cancelling the lease of the plaintiff at Grimmer and Durham Roads, Fremont, California, for a reasonable period of time following the termination of this proceeding, and from leasing said service station to anyone other than plaintiff for a reasonable period of time following the termination of this proceeding (R. 9), and (b) a preliminary injunction restraining appellee from assisting appellant, from refusing to supply gas according to its supply contract, and from by any means preventing appellant

from selling gasoline to the public (R. 15-16).

Section 4 of the Clayton Act states:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C. Sec. 15 (1964).

Section 16 of the Clayton Act states in pertinent part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including Sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is

immediate, at preliminary injunction may issue...Id., Sec. 26

Sections 1 and 2 of the Sherman Act provide:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal . . .

Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a misdemeanor . . . Id., Secs. 1 & 2.

B. Averments of Plaintiff Below

Appellee has embarked on a retail price maintenance program which appellant complains is an unlawful plan to control retail prices of dealers who are in law and in fact independent businessmen under the terms of the leases entered into by them with Union Oil Company. Union Oil Company uses the one year "probationary period" clause in its leases and the power to refuse to renew three-year leases as part of an unlawful plan to control the judgment of individual dealers as to prices and products, in violation of the Sherman Act, sections 1 and 2.

Since about September 1964 defendant has controlled dealers' retail prices under a so-called Retail Dealer Storage and Purchase Agreement. Under this agreement, the wholesale price for the dealer varies according to the fluctuations in

prevailing" retail prices as determined by the Union Oil company. When Union raises its calculated "actual competitive retail price" it also raises its wholesale price to the dealer, forcing him to set his prices parallel to those of the companies Union considers the price leaders. The wholesale price is thus manipulated by defendant so as to control the dealer's retail prices, (a "floating tank-wagon") and by the suasive power of the retail representative, founded on cancellation and non-renewal of leases. Retail dealers' margins are based on the consignment scale in effect under appellee's Retail Dealer Consignment Agreement program and are nothing but sliding-scale commissions exactly as were paid under that concededly illegal system, which appellee used during the period 1955 to 1964.

Independent lessee-dealers are required to follow Union Oil price orders on pain of lease cancellation. (R. 5) Plaintiff specifically avers that in July 1967 Mr. Gary Rowe, the retail representative of defendant, called on plaintiff and told him that his prices were too high, that he should drop his prices and put in Blue Chip stamps, and that if plaintiff was not going to go along with "company policy," the plaintiff should get out and try another company. (R. 7)

Appellant's prices continued at variance with those determined for his station by Union Oil Company, and that although he operated a highly successful business, appellee sought to terminate his three-year lease in furtherance of its plan to control the dealers' independent judgment as to prices and to destroy the independence of the dealers under their leases with Union Oil Company. (R. 8)

C. Proceedings Heretofore

Appellant filed his complaint under the antitrust laws praying for injunctive relief on October 3, 1967, and six days later his Notice of Motion for a Temporary Restraining Order and Preliminary Injunction (R. 15-16), supported by the Affidavit of Joseph Chandler (R. 19-22). This affidavit stated that Mr. Chandler was pumping 55,000 gallons a month whereas the expected gallonage at said service station as stated by defendants was 5,000 a month.

The defendant on October 20, 1967, filed its Memorandum in Opposition to the Motion for Preliminary Injunction, Affidavit of Garry P. Rowe (R. 34), Affidavit of Lee Sovey (R. 39-40), Affidavit of Gene W. Burkett (R. 42-44), Affidavit of Richard Haas (R. 46-53), and Affidavit of J. J. Grunewald (R. 54-73). These affidavits and especially the affidavit of Mr. Grunewald, the division sales manager of Union's California North Coast Division, claimed that Mr. Chandler's prices had nothing to do with Union's determination to exercise option of termination. It claimed that Mr. Chandler had been a difficult man to deal with for the reasons that he refused to attend the dealer training school to become "certified" in any of Union's service training programs; that he put insufficient postage on envelopes mailing credit card invoices; that he would not check the credit card "pickup list" on credit card purchases under \$25; and that he had permitted his public liability insurance to expire. (R. 55-56) Mr. Grunewald's affidavit further indicates that after it was called to his attention that Mr. Chandler had retained counsel, Union decided to offer Mr.

Chandler a lease requiring 24-hour operation, which Mr. Chandler refused, but does not admit any causal connection. (R. 56-57)

Mr. Grunewald denied that Union Oil was engaged in any program or scheme to control dealer's retail prices. (R. 58-61) The affidavit of Gary P. Rowe, Union Oil Company's retail representative, denied that he ever told Mr. Chandler that his prices were too high, and that he had ever told Mr. Chandler that he should drop his prices. (R. 35) Mr. Chandler contradicted the substance of these affidavits in his Affidavit of Joseph Chandler filed October 27, 1967. (R. 83-90)

Union Oil Company filed its answer October 26, 1967, denying the allegations of the complaint except that it admitted certain aspects of its interstate commerce activities (R. 75); its entering into Retail Dealer Consignment Agreements about May 1955 (R. 76); and its entering into a lease with Mr. Chandler as attached to the affidavit of J. J. Grunewald, Exhibit A herein (R. 76). Union Oil claimed that it had no information sufficient to form a belief as to the truth of the averment that Plaintiff was charging 35.9 for regular and 38.9 for ethyl. (R. 76) It admitted that it sent a notice of termination of the lease to Mr. Chandler and denied that any commands were given by Mr. Rowe to Mr. Chandler. (R. 77)

Plaintiff thereafter filed Affidavit of Frank K. Weingartner (R. 91), Affidavit of Vernon Ellsworth, appellant's insurance agent (R. 147-157), and Affidavit of James W. Ambleton (R. 145-146). Union Oil Company filed supplemental affidavits: Supplemental Affidavit of Gary P. Rowe (R. 94-101); Affidavit of Roland C. Simonsen (R. 103-105); Supplemental

Affidavit of Lee Sovey (R. 107-108); Affidavit of R. C. Weaver (R. 110-111).

On October 30, 1967, plaintiff's motion was continued to November 3, 1967, at which time arguments were heard before the Honorable Lloyd H. Burke. (R. 159) Judge Burke concluded that he should have a hearing on plaintiff's motion, and the matter was continued to Thursday, November 9, 1967. Reporter's Transcript of Hearings, 54-55, Chandler v. Union Oil Co., Docket No. 47961 (hereinafter cited as Tr.). After hearings held before Judge Burke on November 9, November 13, and November 17, 1967, the court issued its order denying plaintiff's motion. (R. 113; Tr. 367-370)

The Court on plaintiff's motion allowed plaintiff a seven-day stay order pending appeal. (R. 372) Plaintiff then filed his notice of appeal (R. 135) and filed in this Court his Motion for Order to Stay Enforcement of Order Denying Plaintiff's Motion for a Preliminary Injunction, Memorandum of Points and Authorities, Affidavit of Maxwell Keith, and Proposed Order. Appellee filed its Memorandum in Opposition to Appellant's Motion to Stay Enforcement of Order and this Court on December 5, 1967, denied petitioner's motion for an order to stay enforcement.

FACTS

a. Origin of the Controversy

Appellee let the service station property on Durham and Grimmer Roads, Fremont, California, to appellant. (R. 62-65) The lease is for a three-year term, November 18, 1967, to November 17, 1969, subject to a one-year "probationary period"

clause. (R. 63, Para. 10; R. 6-7)

The lease provides for specified rent payable monthly with annual minima of \$6,660 for the first lease year, \$7,676 for the second lease year, and \$8,458 for the third lease year. The lessee also agrees to pay as rent the sum of two cents per gallon for each gallon of gasoline delivered to the station, or, at Union's option, sold therefrom, and in addition an amount determined by lessee's sales revenues from certain other products. The lease limits the use of the premises to the operation of a gasoline station and provides that the lessee has the duty to maintain the premises and the improvements in good repair and in clean and safe condition. Under the lease Mr. Chandler agrees to indemnify Union Oil Company against any claim for injury to property or person occurring on the premises during the operation of the lease. He further agrees to carry policies of insurance satisfactory to Union issued by an insurance company approved by Union with certain specified liability limits. The lease provides for eighteen hours of operation, from 6:00 a.m. to 12:00 midnight. (R. 65)

The lease refers to a retail storage and purchase agreement between the parties and provides that any breach of that agreement is a breach of the lease and that, at the option of Union, written, noticed cancellation of the contract terminates the lease. (R. 62, Para. 4) The Retail Dealer's Storage and Purchase Agreement provides that Union Oil shall have title to gasoline stored at the service station until the gasoline is dispensed through the dealer's pumps. Under it the dealer is solely responsible for operation of the station,

management of his staff and control of his legal and financial obligations. The storage and purchase agreement is also for a three-year period subject to prior right to terminate based upon the provisions in the lease. (R. 68, Para. 12)

* * *

Union Oil Company sought out Joseph Chandler in about October of 1966 and attempted to interest him in a new service station located at Grimmer and Durham Roads, Fremont, California. (Tr. 89-91, 109) Mr. Chandler was interested in the location and asked to see the papers that needed to be signed. The papers were not produced, but Union assured Mr. Chandler it had a good deal for him. Appellant accepted the station and opened on the 18th of November, 1966, without having signed the lease involved. The lease was not presented to Mr. Chandler until the afternoon of opening day. (Tr. 95, 8-99) At that time Mr. Chandler noticed the "probationary period" clause and questioned Union Oil Company's representative, Mr. Roland Simonsen, about it. The court below made no findings as to whether Mr. Simonsen said, as appellant testified, that it was in there for only guys who ran a garage and did not pump a lot of gasoline, and whether Simonsen further advised Mr. Chandler, "Don't worry about the one-year clause." (Tr. 101) It was only after their conversation that Mr. Chandler signed the lease, at about 1:30 p.m.

Union Oil Company's representatives had said nothing about Mr. Chandler's right to operate as a "purchase and sale" dealer, and had talked in terms of a "good deal" under Storage and Purchase in that the dealer didn't have to "tie his money

p". (Tr. 94) Under "purchase and sale", the dealer would purchase his gasoline at the price prevailing when delivered to the station. Under "storage and purchase", the gasoline stored on the premises is Union's, and is bought by the dealer as he pumps it out. Thus the dealer must buy at Union's floating dealer's price. On opening day Mr. Chandler was also told that he was expected to purchase Union Oil Company's sponsored auto filters, Auto lite brand, and was requested to rebbox his Delco-Remy supplied in Autolite boxes. (Tr. 123-124)

From the outset appellant displayed the ability to run a highly successful business. Employing his own judgment about all matters in which he was not restricted by his agreements, he more than doubled the gallonage figure projected for the station by Union's retail sales supervisor. (R. 81)

During the first seven months there was little friction between the parties. Union adjusted the training school requirement in view of Mr. Chandler's experience. (R. 105; Tr. 91-92) Mr. Chandler maintained public liability insurance at all times, (R. 148) and operated a clean, well-staffed station. Union required Mr. Chandler to pay credit charge kickbacks where the uncollected charge was on an account listed on Union's "pickup" mailings. Mr. Chandler complained it was commercially impossible to check each card against a lengthy list of numbers before completing the transaction, but accepted the kickbacks as a cost of doing business except for purchases on cards designated as highest credit rating ("gold cards", see Tr. 167); he continued to negotiate with Union as to their

pective responsibilities for gold card charges. Otherwise, the sole source of complaint by Union was that Mr. Chandler had put insufficient postage on his mailings to Union. This appellant corrected on request in February or March, 1967 (Pl. Ex. 85.) In June 1967, retail representative, Mr. Gary P. Rowe, came on the premises and examined Mr. Chandler's records without permission. (Tr. 115)

Shortly thereafter, Mr. Rowe on June 6, 1967, came to Mr. Chandler's station. Mr. Chandler had been charging 35.9¢ for regular gas and 36.9¢ for ethyl gasoline. Mr. Rowe commented that appellant's gallonage had dropped, and appellant indicated he was doing all he could think of to retain customers. Mr. Rowe replied that he can drop his retail prices to the level of 33.9¢ and 36.9¢, like Hebel's at Warm Spring. Mr. Rowe further said that if he was not going along with company policy, he should get out and try another company. (Tr. 116-117)

Mr. Chandler continued to charge 35.9¢ and 38.9¢ and did not put in Blue Chip stamps. On June 12 Union Oil Company noticed an hour-infraction in that the station opened at 6:17 a.m. instead of 6:00 a.m. For this infraction Mr. Rowe requested that a lease violation notice be issued. (Pl. Ex. 9) Mr. Burkett, Union Oil's sales manager, then sent a letter of Mr. Chandler complaining of this seventeen minute infraction (Pl. Ex. 10) and warning him that it would result in lease cancellation. Without telling Mr. Chandler, Union Oil Company advertised his station as available as early as July 28, 1967 (Pl. Ex. 11).

On or about July 31, Mr. Chandler received a phone call from Mr. Rowe asking him if he would buy some tires and batteries. (Tr. 121) Mr. Chandler told Mr. Rowe that he didn't feel it was right that he buy any more Union tires and batteries because he had heard that they were kicking him out of the station. Mr. Rowe at first denied it, then said, "We'll come out and have some lunch and talk it over." (Tr. 122) The conversation that ensued is related by appellant:

I met him at my station at 12:00, and he and I went to the Lyon's Cafe in Fremont, and during this lunch he admitted that he had interviewed three or four dealers for my station and that they -- he was to make his decision with his supervisor the next morning as to whether they were going -- he would put me out, whether he would favor putting me out. And that if I would change my -- go along with Union's policies and buy all my products from them, that he would make the decision in my favor.

And I informed him that I would continue to operate as an independent businessman, and that when he made his decision, why, it make it with that in mind.

And he agreed to call me the next morning,

which he did, and told me that he had met with his supervisor and they had decided to take the station. (Tr. 122)

Nine days later Mr. Chandler received a letter dated August 2, 1967, seeking to terminate his tenancy under the one-year "probationary period" clause. Both appellant's leasehold and his ability to obtain gasoline are now under attack by appellee. Since December 1967 Union has refused appellant gasoline and since March 8, 1968, has denied appellant access to the premises pursuant to a state "unlawful detainer" judgment.

That it was neither usual nor sensible for Union to terminate its high-gallonage dealer is material only insofar as it shows the relationship between the letter of August 2 and the retail price-setting policies which have been pursued by appellee for nearly fifteen years through various devices. Chandler's record was superb. Union could point to only three small hour infractions and a single customer complaint during appellant's entire period of operation. (See Def. Ex. F) He had made no purchase which violated his agreements. But the independence Chandler showed was directly contrary to a cardinal tenet of Union's marketing program: that it is in the interest of the Union Oil Company that its dealers charge specified prices to the motoring public.

This was made explicit at a dealer meeting of September 7, 1967. There Gary Rowe told Mr. Frank Weingartner and Mr. William Lawson that Chandler was a good dealer. According to appellant's witnesses, Rowe went on to say that he had someone who would come in and take the station as a twenty-four hour

operation giving Blue Chip stamps, and, who would charge 33.9
and 36.9 cents per gallon of gasoline. (Tr. 252-255, 264-265)

These were the new prices set by Union as proper retail for its gasolines in the area, and were the subject of a campaign beginning September 16, 1967, in which Union urged its dealers to charge a three-cent differential, or "spread", between regular and high-test, instead of the then customary four-cent spread. Union sent its representatives to the dealers' places of business with new price signs and numerals, and adjusted its wholesale prices accordingly. (Tr. 304-308; see Pl. x. Nos. 6, 15-17, 19)

Despite these indications of an attempt on Union's part to secure compliance with its retail price determinations by suasive means, the court below refused to hear evidence on appellee's business methods. (Tr. 299)

b. Findings Below

The District Court based its denial of plaintiff's motion on two express grounds. First, that there was not sufficient showing of likelihood of success that appellant would prevail at the time of trial; and second, that plaintiff did not suffer irreparable harm or damage inasmuch as Union Oil Company is able to respond to treble damage judgment. The Court further indicated that it regarded its jurisdiction as based solely upon Section 16 of the Clayton Act and that it was not going to go into the matter of defendant's good faith or good cause under its general equity power. (See Tr. 369-370)

c. Other Cases Pending Between the Parties

Union Oil Company has filed an action in unlawful de-

ainer in the Alameda County Superior Court. Judgment of the trial court was for plaintiff, and an appeal is anticipated. As the trial judge denied appellant's motion for stay of execution until final determination of the issues involved, appellee is now in possession of the premises. Until such time as appellee is enjoined from its efforts to nullify or terminate appellant's leasehold, appellant is unable to utilize the property and is thus being prevented from there engaging in his means of livelihood.

JOSEPH CHANDLER has filed an action against Union Oil Company in the same court charging Union Oil Company with breach of its lease and supply contract agreement and violation of the Antitrust Act. This action has not been set for trial.

QUESTIONS PRESENTED

1. Where a party seeking a preliminary injunction has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation, must he also show probability that such questions will ultimately be resolved in his favor before such injunction will issue?

2. Is a defendant who is financially able to respond in treble damages for its antitrust violations immune from injunctive relief against its efforts to destroy the business established by a plaintiff on the ground the harm so done cannot be irreparable?

3. May a federal district court refuse to exercise its general equity jurisdiction in considering a motion for pre-

liminary injunction which is based on antitrust violation?

4. May a district court exclude matters tending to show operation of a defendant's illegal plan and program from its hearing upon a plaintiff's motion to obtain a preliminary injunction against a phase of such plan and program under Section 16 of the Clayton Act?

SPECIFICATION OF ERRORS

1. The Court applied an erroneous standard or element of proof in denying a preliminary injunction.

2. The Court incorrectly restricted its equitable subject matter jurisdiction to conduct directly violative of Federal statute by excluding consideration of defendant's bad faith, overreaching, fraud and misrepresentation from its decision on injunctive relief.

3. The Court erred in excluding evidence as to the illegal operation of Union Oil Company's retail dealer storage and purchase agreement program and policy.

4. The Court erred in accepting the existence of motivations other than those violative of the Sherman Act as a complete defense..

5. The Court erred in considering destruction of a business reparable by treble damages as a matter of law.

6. The Court exceeded its discretion in denying plaintiff's motion for a preliminary injunction on the record below.

7. The Court erred in failing to make Conclusions of law sufficiently expositive to permit review.

SUMMARY OF ARGUMENT

The Court has before it the parties to a three-year lease covering the property where appellant does business. The appellee-lessor is also the wholesale supplier of appellant-lessee's main item of trade, gasoline.

The suit arose over appellee's ouster of appellant and its efforts to prevent him from obtaining gasolines bearing appellee's trademark. Because appellee's actions are a key part of its program to control the price at which merchants resell its gasolines in interstate commerce, suit was brought under the federal antitrust laws. The subject of this appeal is denial of appellant's motion for a preliminary injunction, whereby he seeks to retain his leasehold and livelihood pending final adjudication of the rights of the parties.

At least two reviewable issues are raised by the ruling below: (1) Did the district judge, in setting the standard of proof, apply incorrect legal principles to appellant's motion? (2) Was the Court's exclusion of evidence bearing on the illegality of appellee's conduct prejudicial to appellant's right to a fair hearing on all issues?

While the exercise of a trial judge's discretion in granting a preliminary injunction is reversed only for "abuse", conduct of the court outside the area of discretion is fully reviewable. Although in this case the findings of fact and, particularly, the conclusions of law are so incomplete as to make review difficult, the record is sufficiently clear to reveal error. Rather, then, than simply to remand for more revealing findings, this Court should offer guidance where error

appears.

The court was not acting in a discretionary area if, as appears by implication, it ruled that the plaintiff seeking to enjoin loss of his business resulting from an antitrust violation by his lessor-supplier must demonstrate likelihood of ultimate success. Although the federal district courts are in conflict as to the correct test, the choice of test is unquestionably a matter of law which this court must review.

The Third Circuit has had occasion to enunciate the rule applicable in trial courts, and appellant urges this court to follow suit. In district courts, under the prevailing authority, a party in whose favor the equities lie is entitled to a preliminary injunction in cases whose ultimate outcome is doubtful if his complaint raises issues so serious, substantial and difficult as to be fairly subject to further litigation. Those district courts which have held otherwise mistakenly adopt the rule which has been held applicable to motions made in circuit courts, where the movant may indeed be required to show a great likelihood he will prevail.

Even on undisputed facts appellee's ouster of appellant raises a serious question, viz., whether an oil company may use its sales supervisors to specify retail prices to its dealer in conformity with announced company price policy, where the dealer's place of business is rented from the oil company on a three-year lease which may give short-notice termination rights to lessor, and where termination or non-renewal is directly affected by the recommendation of the sales supervisor, whose duties include implementation of company policies and

marketing decisions. The lawfulness of such a scheme is squarely questioned by appellant's complaint. The fact the appellant cannot exclude all other motives in appellee than price-fixing does not gainsay the key role of lease-cancellation in a price-control system to which he was subject, nor does it render insubstantial the contributory effect of his noncompliance with price policy.

Though it may ultimately be found that price-control is appellee's only motivation, it was error for the district judge to require such a showing as a precondition of preliminary injunctive relief. If the possible existence of motives related to price is made a complete defense to preliminary injunctive relief from damaging behavior, then the overwhelming majority of violators will be freed to continue harming their victims until the day a judgment becomes final. In the field of antitrust litigation this is a death sentence for small plaintiffs.

The court also ruled that appellee's ability to respond to damages was an adequate remedy. Such a ruling is not exercise but abdication of a trial judge's discretion to consider the adequacy of a remedy at law. The court below did not have the power to erect an equitable maxim of de jure adequacy to shield the well-capitalized wrongdoer from exercise of its injunctive sources.

In ruling on the scope of the issues, the court excluded evidence of how appellee's price-control system operates and of inequitable conduct on the part of appellee in securing the agreement which it contends gives it the right to terminate

appellant's leasehold. The record does not indicate the reason why the court, having considered appellant's showing on the ultimate issues pivotal, did not permit appellant to prove that appellee is carrying on an unlawful price maintenance program. The court, however, did indicate that it would exclude evidence of all inequitable behavior except that which directly violated the antitrust laws on the grounds that such issues were for the state courts. In this the court misconceived the scope of its jurisdiction, which includes the granting of complete relief beyond the language of the federal statutory remedy where chancery is invoked. By refusing to hear appellant it deprived itself of an informal conscience and appellant of a substantial right.

ARGUMENT

I. VICTIMS OF ANTITRUST VIOLATIONS CANNOT BE REQUIRED TO DEMONSTRATE PROBABILITY OF ULTIMATE SUCCESS BEFORE THE COURTS WILL TEMPORARILY ENJOIN DESTRUCTION OF THEIR BUSINESSES.

In this section appellant directs the attention of the Court to the area outside the discretion of the district judge below. How that discretion was exercised is treated separately in part II.B., infra, p. 48.

It is as essential that the circuit courts be satisfied that correct principles of law were applied in denial of a preliminary injunction as in its granting. Cf. Sparks v. Ellwood Dairy, 74 F.2d 695 (6th Cir. 1934) (findings & conclusions not set forth). There is not less responsibility to see that trial courts make full and impartial determinations of

Facts. See Sims v. Greene, 161 F.2d 87 (3d Cir. 1947); cf. Pacific Cage & Screen Co. v. Continental Cage Corp., 259 F.2d 87 (9th Cir. 1958); Chas. Pfizer & Co. v. Zenith Laboratories, Inc., 339 F.2d 429 (3d Cir. 1964).

In reversing denial of a preliminary injunction where the district court had, inter alia, applied an unduly restrictive test of interstate commerce, the Second Circuit stated the theory of review:

The granting or denial of an interlocutory injunction is usually relegated to the discretion of the District Court, which an appellate tribunal is reluctant to disturb. State of Alabama v. United States, 279 U.S. 229, 230, 231, 49 S.Ct. 266, 73 L.Ed. 675. But here the trial court's denial of the injunction was based in substantial measure upon conclusions of law which can and should be reviewed because of their basic nature in this litigation. Cf. Bowles v. NuWay Laundry Co., 10 Cir., 144 F.2d 741; Bowles v. May Hardwood Co., 6 Cir., 140 F.2d 914; Coty, Inc., v. Leo Blume, Inc., 2 Cir., 294 F. 679. The case then should be remanded for action by the District Court in the light of the legal principles thus enunciated.

Ring v. Spina, 148 F.2d 647, 650 (2d Cir. 1945).

Although this Court has not heretofore confronted a record comparable to that in Ring v. Spina, supra, it has necessarily observed the principle of distinguishing areas of discretion from those reviewable on normal grounds. Thus, in upholding rulings of district courts, this Court has under-

taken to determine whether the trial judge had accurately interpreted the Organic Act of Guam, Phelan v. Taitano, 233 F.2d 17 (9th Cir. 1956), and whether the court below had correctly applied a federal trademark act, Dymo Industries, Inc. v. Tapeprinter, Inc., 326 F.2d 141 (9th Cir. 1964). This duty of review is in no way inconsistent with the proposition, predicated on the assumption that there was no misapplication or misconception of law, that a district judge's decision to deny relief is reviewable only for abuse of discretion.

A preliminary injunction is proper when a movant in whose favor the balance of hardship lies "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberate investigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (court's footnotes omitted). Judge Frank in Hamilton properly directs the attention of the district courts to the question of whether the preliminary injunction will cause or prevent harm, rather than whether the moving party can show at the preliminary stage that it will ultimately prevail. See Natco Corp. v. Great Lakes Industries, Inc., 214 F. Supp. 185 (W.D.Pa. 1962); Briggs Mfg. Co. v. Crane Co., 185 F.Supp. 177, 185 (E.D. Mich. 1960) (alternative holding); cf. Thrift Air Club, Inc. v. Eastern Air Lines, Inc., 272 F. Supp. 307 (S.D.N.Y. 1967); Parke, Davis & Co. v. Green Willow, Inc., 205 F.Supp. 346, 351 (S.D.N.Y. 1962).

Thus there are two distinctions to be made among applicants for preliminary relief: (a) between those whose ultimate fate is apparent and those who raise fairly litigable

issues of doubtful outcome, and (b) between those on whom the hardship of denial is only slightly greater than would be the hardship on the opponent of granting the motion, and those toward whom the balance of hardships "tips decidedly," Hamilton, supra, at 740. If under distinction a, the court finds the party clearly right or clearly wrong on settled law it can act accordingly. If, however, the resolution of a controlling question is doubtful, the court should not end its enquiry, but should determine the question in b, by balancing the effect of requiring the defendant to continue temporarily to deal with an able and efficient retailer against the effect on plaintiff of his being put completely out of business. It is not enough to avoid the question by finding defendant able to pay some treble damage claim which may be asserted in futuro.

In this Circuit the question of whether a failure to prove likelihood of ultimate success defeats a motion for preliminary injunction in all instances has not been decided.* Where the question of disparity of hardship was apparently not raised it has been held fatal, United States v. Crocker-Anglo at'l Bank, 223 F.Supp. 849 (N.D. Cal. 1963), but no district court has criticized or refused to follow the analysis of Judge Frank. The Northern District may, indeed, have foreshadowed it in United States v. Dollar, 97 F.Supp. 50 (N.D. Cal. 1951), where the successful movant's ultimate success

the effect of the public interest in private enforcement of antitrust laws on the granting of preliminary injunctions is also unsettled. Cf. Federal Trade Comm'n v. Rhodes Pharmacal Co.,

depended upon the overruling of a circuit court decision.

The legality of appellee's leasing-marketing system is in serious dispute. See United States v. Parke, Davis & Co., 362 U.S. 24 (1960); cf. Albrecht v. The Herald Co., 347 Ant. & Trade Reg. Rep. X-1 (Mar. 5, 1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964). Clearly the papers and preliminary hearing disclosed questions going to the merits which are substantial, and on which the outcome is sufficiently unclear to make further litigation necessary, and a crushingly greater hardship on appellant than on appellee. On these facts the preliminary injunction should have been granted, under the foregoing test.

Indeed, even if plaintiff were required to show a reasonable likelihood of success, the record shows him entitled to relief:

a. The Wrong

Mr. Chandler has, under all the circumstances of his tenancy, been laced into Union's retail price control system. The Supreme Court made clear in United States v. Parke, Davis & Co., that a supplier may not use coercion on its retail outlets to achieve resale price maintenance ... [I]t matters not that the coercive device it.

Id., 17. The decision in Lessig v. Tidewater Oil Company, 327 F.2d 459-463, (9th Cir. 1964) is useful for comparison with the instant case:

By maintaining, or increasing, the wholesale price when the retail price declined, Tidewater brought pressure upon dealers to accept "dealer aid" and the accompanying

condition requiring resale price maintenance.

In addition, Tidewater's representatives checked the prices at which dealers sold their gasoline, told dealers the price changes they were to make, changed prices posted on their pumps, placed price signs on the station premises reflecting the new price, and threatened to terminate and terminated dealers' leases contracts if dealers did not comply with suggested price changes. Lessig was given notice of termination of his lease and contract three days after he refused to reduce his resale price when Tidewater's district sales manager told him it was two cents too high.

The record showed Union Oil Company maintained a floating tank wagon system, that is, that gasoline prices to the dealers were subject to Union Oil's raising or lowering them at its discretion. (Pl. Ex. Nos. 6, 15, 17) This ability to fluctuate the wholesale price, combined with the price telling role of the retail representatives in the context of three-year leases with probationary period clauses, allowed Union Oil Company to bring pressure on the dealers to adhere to its determination of retail prices. Plaintiff's Exhibit 15 shows that reduction in wholesale purchase price depends upon Union Oil's determination of prevailing retail selling price in the trading area it delineated. Union's price maintenance program thus incorporated the power to "zone" a dealer in a way favorable or unfavorable to his buying price for gasoline.

The affidavit of Mr. Hambleton shows that Union Oil carried out retail price instructions. Mr. Hambleton was told by the Union Oil Company representative to watch the Shell dealer across the street; if Shell lowered the price to call Union Oil company and they would inform them whether they would lower the selling price on a 70-30 scale.* After the first drop Union Oil stated that if Shell thereafter changed prices Mr. Hambleton should adjust his retail prices to meet them. (R. 145-146) The record further shows that following the September 16, 1967, latter Union Oil Company's retail representatives brought price signs and price numbers to the dealers, virtually all of whom were operating under a three-year lease or a three-year lease with a one-year probationary period clause. (Tr. 306-308). The dealers were told at meetings by Mr. Burkett not to raise retail prices even though their costs were increased by promotional decreases. (Tr. 138)

Six days after the price conversation testified to by Mr. Hambleton, Rowe issued a memo to the Union Oil office asking for the first time that a lease violation notice be issued, based on a seventeen-minute "hour infraction" by appellant. (Pl. Ex. No. 1). A trier of fact could well conclude that this was harassment designed to have the dealer obey company price directions. In view of all the facts, Rowe's denial that he

I.e., the wholesale price declining 0.7¢ for every 1.0¢ decline in selling price. This is the same as the sliding commission mentioned in Simpson, p. 37 supra, AND AT ST substitutes price instructions for express agency.

discussed prices does not make Chandler's ultimate success unlikely.

There is no question that Union's resale price maintenance efforts are not limited to refusals to deal announced in advance. Its policies are also contrary to the principles which have grown out of the courts' specific scrutiny of the oil industry. The reasons advanced by Mr. Grunewald for the lease cancellation involved matters unrelated to leasehold occupancy. Yet Judge Yankwich in United States v. Richfield Oil Corporation, 9 Fed. Supp. 280 (S.D. Cal. 1951), made it clear that agreements relating to or affecting distribution upon a leasehold interest cannot be superimposed. The court held there that Richfield should be prohibited from using the 24-hour termination clause at all to enforce its restricted conditions as to the products sold on the premises. If there are breaches of covenants or conditions or contracts between Union Oil and dealer, it should resort to the courts for breach of contract or breach of lease, whatever the situation may be. Under the Sherman Act it cannot be allowed to exercise cancellation of leases as a means of enforcing its marketing policies.

It is respectfully submitted that Section Sixteen of the Clayton Act, 15 U.S.C. § 26 (1964), expresses the will of Congress that forfeiture of property and such measures as are used here against a person whose record shows an established successful operation become impermissible when part of a price-fixing program. The law protects dealers against large distributors who on the one hand require them to assume all risks of the enterprise and at the same time seek to control them as an

employee. Forfeiture of estates is not favored by general law and is particularly pernicious when invoked to enforce marketing policies in restraint of trade. The Supreme Court in Simpson v. Union Oil Co., supra, enunciated federal antitrust policy that dealers are not to be ousted from their stations for reasons having to do with the control of prices or for refusing to agree that they will obey company policies which include price control.

b. The irreparable injury.

There is irreparable injury when a person loses his business and the goodwill he has generated. A business venture is by its very nature a speculative enterprise. It is basic to our system of government that an individual have the opportunity to take full advantage of his skill and his fortune. The latter may be a necessary ingredient for great success, but its presence cannot be calculated in advance. No court of law can compensate a businessman for opportunities lost through the death of his enterprise, for its ultimate growth is not determined at its birth. It is respectfully urged that the better view is that of the Honorable W. T. Sweigert in Weingartner v. Union Oil Co., 1966 Trade Case Para. 71, 757 at 82,500-82,501.

1965)(uncontroverted allegations prima facie sufficient):

In the event that preliminary injunctive relief is not granted, plaintiff, who has been engaged in the gasoline service station business at his present premises for more than three years will lose his business, the customer goodwill established during these three years and his means of livelihood -- a result which,

if ultimately held to have been wrongful, would be difficult to compensate in money damages.

. . . [T]he established business relationship between plaintiff and defendant, involving as it does merely the sale of gasoline to independent service station operators, did not significantly involve personal elements of trust, confidence or other similar factors as would make it unfair to require continuing plaintiff in possession of the service station in question and that defendant resume supplying plaintiff Weingartner with gasoline and other products as before the expiration of the lease, pendente lite or at least until further order of the Court.

It simply cannot be said that money repairs all damage as a matter of law. Trebling provable recovery is at best a clumsy approximation of compensation for imponderables, and cannot be compared with prevention of the wrong for efficiency to the ends of justice." See Rank v. Krug, 142 F. Supp. 1, 160-161 (S.D. Cal. 1956), aff'd in part sub nom. Dugan v. Rank. 372 U.S. 609 (1963); Nadell & Co. v. Grasso, 75 Cal. App. 2d 420, 346 P.2d 505 (1959); cf. Rodgers v. United States, 158 F.Supp. 670, 679 (S.D. Cal. 1958).

There appears to be no issue of causation of injury. That is, if appellee's attempts to take away appellant's lease interest are wrongful under the Sherman Act, then the loss of business is unquestionably the direct result of the violation. The district court's finding (R. 130) that movant had not established price policy as "the cause" behind Union's course of

conduct must, then, be directed not to a causality issue such as that treated in Haverhill Gazette Co. v. Union Leader Corp., 33 F.2d 798, 805-806 (1st Cir. 1964) (harm compensable when antitrust violation a substantial cause among others), but to the question of illegality itself. Implicit in the finding is misorientation about the reason a given act is or is not a violation of the antitrust laws under Section 4 of the Clayton Act. Appellant contends but was not permitted to show that Union maintains a resale price maintenance program in which floors are set by a "floating tank-wagon price" plus operating costs (including a per-gallon rent charge) and ceilings by the peculiarly suasive retail price notifications of sales supervisors who also administer appellee's landlord-tenant relationship with the dealers and who make recommendations as to the cancellation or non-renewal of leases. Cancellation and non-renewal are the motive part of machinery whose existence offends the Sherman Act because its effect is to exact compliance with the manufacturer's "list" retail prices. Appellant was hurt by the operation of Union's price-fixing mechanism regardless of whether appellee, were it not breaking the law, would also have sought termination of his estate.

In its demand for a single-factor analysis of the termination, the court did not even direct its enquiry to whether furtherance of an unlawful resale price program "substantially contributed" to appellee's decision. See Osborn v. Sinclair Ref. Co., 286 F.2d 832, 837 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961). As the Osborn court subsequently indicated, its holding that the company had terminated its lessee

dealer "partly because" he did not abide by its illegal marketing policy, Osborn v. Sinclair Ref. Co., 324 F.2d 556, 569, 75 n.18 (4th Cir. 1963), precluded the defense of right to terminate under the lease, id., 575 & n.17. Indeed, where, as here, the termination is "part and parcel" of the unlawful conduct, there is no requirement of direct purpose at all, as these elements have been stated in the alternative by the Supreme Court. See Poller v. Columbia Broadcasting System, 368 U.S. 64, 468-469 (1962).

The immediacy of the harm threatened by appellee is now greater than before. Appellee has intensified its attack on appellant's leasehold and ability to sell gasoline by depriving him of access to the premises. The fact that Union is occupying the station under a state "unlawful detainer" judgment would not affect appellant's federal right, even if the judgment were final. Cf. Maryland Gas Co. v. Pioneer Seafoods Co., 116 F.2d 38 (9th Cir. 1940)

Wrongful ouster in violation of a law of the land promulgated by the Federal Congress is not dignified by its consonance with the decision of a state court. See Chase Nat'l. Bank v. City of Norwalk, 291 U.S. 431 (1934). Even if, as is plainly not the case, a state court could conclusively determine the issue of right to immediate possession, the present appeal would not be affected, as appellant seeks relief going beyond mere possession. Cf. Lincoln Printing Co. v. Middlewest Util. Co., 74 F.2d 799 (7th Cir. 1935) (broadly framed prayer withstands change in circumstances). To find the harm to Union in continuing to do business with Mr. Chandler at

the premises in question in any way comparable to the harm to be suffered by appellant from the impending death of his enterprise would be to adjudicate in a vacuum.

II. A PARTY SEEKING INJUNCTIVE RELIEF INVOKES
INHERENT EQUITY POWER TO GRANT A COMPLETE
REMEDY BASED ON A FULLY INFORMED CONSCIENCE.

A. Misconception of Jurisdiction

The court below erred in restricting its equity jurisdiction. It is respectfully submitted that the federal courts in antitrust proceedings are to use such powers as have been developed by courts of equity, see 15 U.S.C. Sec. 26 (1964) and thus should grant complete relief. A party is entitled to invoke chancery powers to enforce the effectiveness of his legal remedy. Bateman v. Ford Motor Company, 302 F.2d 63, 66 (3d. Cir. 1962). Nonetheless, the court below turned its back on the injustice of Union's attempt to terminate the lease in a manner contrary to the statement it made inducing appellant to accept the termination clause.

The court also expressly indicated it would not determine whether Union's marketing methods would be regarded as an antitrust violation. This ruling prevented the plaintiff from showing his full proof on the very subject matter erroneously raised by the question of ultimate success. More significantly, the court thereby deprived itself of an informed ruling on the equities as between the parties.

B. Abuse of Discretion

The term "discretionary" does not oust appellate courts of jurisdiction. See Crites v. Prudential Ins. Co., 322 U.S. 408, 418 (1944). Failure to make distinctions in the

exercise of discretion may be corrected on appeal. Woods v.
City Nat'l Bank & Trust Co., 312 U.S. 262, 270 (1941). Whether
not appellant was denied a fair hearing under Truax v.
Harrigan, 257 U.S. 312 (1921), fundamental fairness requires that
the court neither predict outcome nor purport to balance equities
without an examination of appellee's illegal conduct.

CONCLUSION

The Court should reverse the determination below and
then enter a preliminary injunction, or order further hear-
ings in which plaintiff can establish more fully at this stage
of the case the program and policy of Union Oil Company, in
accordance with applicable legal principles.

WHEREFORE, appellant respectfully prays that the Order
denying plaintiff's motion for a preliminary injunction be
reversed and that the judgment of the court below be reversed.

Respectfully submitted,

MAXWELL KEITH
R. CORBIN HOUCHINS

By: _____
MAXWELL KEITH
Attorney for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19³⁹ of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MAXWELL KEITH

AFFIDAVIT OF MAILING

STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO)

SS.

VICTOR JACOBS, being duly sworn, deposes and says:

That he has caused to be served a copy of the Appellant's Opening Brief in the above entitled action by mailing a copy of the Appellant's Opening Brief to the following named attorneys for the Appellee in the said case at the address hereinafter set forth, postage paid, this 20th day of March, 1968.

Mr. Richard Haas,
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California

Attorneys for the Appellee.

VICTOR JACOBS

Subscribed and sworn to before me
this day of March, 1968.

Notary Public
In and for the City and County of
San Francisco, State of California

My Commission expires: _____

TABLE OF EXHIBITS

Plaintiff's Exhibits

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
1		96	96	
2		97	97	
3		98	98	
4	111	111	114	
5		135	135	
6		141	141	
7		230	231	
8		230	231	
9		243	243	
0		243	243	
1		244	244	
2	290	6	6	
3	290	6	6	
4	290	6	6	
5		309	309	
6		310	310	
7		310	311	
8	328			
9		329	330	
0	331	330		330

TABLE OF EXHIBITS

Defendant's Exhibits

<u>Exhibit Number</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>	<u>Rejected</u>
		160	160	
		172	172	
		185	185	
		333	334	
		335	335	

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORTER D. WHITE,
Appellant;
VS.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

CASE No. 22409 ✓

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

A P P E A R A N C E S

FOR THE APPELLANT:

PORTER D. WHITE, IN PRO. PER.
BOX 2210 C.C.C.
SUSANVILLE, CALIFORNIA

FOR THE PEOPLE:

THOMAS C. LYNCH, ATTY GEN.
600 STATE BUILDING
SAN FRANCISCO, CALIFORNIA

FILED

JAN 26 1968

WM. B. LUCK, CLERK

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CONSTITUTIONAL PROVISIONS

THE CONSTITUTIONAL INVOLVED ARE THE SIX AMENDMENT AND THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION, AND CALIFORNIA CONSTITUTION. ARTICLE 6 SECTION 13

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Porter D. White
Box 2210
Susanville, California

Appellant In Propria Persona

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORTER D. WHITE,
Appellant,
Vs.
PEOPLE OF STATE OF CALIFORNIA,
Respondent.

CIVIL No. 22479

TO: THE HONORABLE CHIEF JUDGE AND JUSTICES, AND THE
HONORABLE CLERK OF THE ABOVE ENTITLED COURT:

(WITH REFERENCE TO RULE 13: RULES OF THIS COURT)

Porter D. White, (Appellant herein) moves this Honorable Court, and the Honorable Clerk of this Court, that he be allowed to proceed after having prepared the foregoing brief upon irregular paper and in an irregular manner. Appellant is confined in state prison and is therefore a prisoner of the State of California. This institution affords no facilities whereby appellant may adequately meet the requirement of Rule 13.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGONE IS
TRUE AND CORRECT.

DATED: JAN. 23, 1968

Porter D. White

Porter D. White. In Pro. Per.

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Porter D. White
P.O. Box 2210
Susanville, California

In Propria Persona

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PORTER D. WHITE,)	CIVIL No. 22479
Appellant,)	
vs.)	
)	
PEOPLE OF STATE OF CALIFORNIA,)	
Respondent.)	

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

PURSUANT TO RULES 73 (a) (b) (g), 75 (a) (b) OF THE
FEDERAL RULES OF CIVIL PROCEDURE AND RULES OF THIS
COURT, RULE 17 (1) and (2) AND RULE 18.

On September 8 1967, an application for Writ of Prohibition
was filed in the United States District Court For the Northern
District of California, Southern Division, by Porter D. White.
(Hereinafter referred to as Appellant) requesting that the First
Appellate District Court of Appeal of the State of California
be enjoined from further proceedings in the matter of People v.
White. #5780. An appeal from the judgment of a Superior Court

of the State of California. The Honorable Stanley A. Weigel United States District Court Judge, denied the Petition for Writ of Prohibition without an opinion. Notice of Appeal was mailed to the United States District Court Clerk, James P. Welsh on October 19, 1967. It is from the adverse ruling of the Honorable Judge Weigel, and his failure to give an opinion in the matter that appellant now appeals. Appellant is asking this Honorable United States Court of Appeals to reverse the opinion of the Court below: to grant the relief sought, or to give an opinion why the relief sought should not be granted.

STATEMENT OF THE FACTS

These same questions have been presented to this Honorable Court in several other petitions (see files of this Court #3746) which were denied because an appeal was then pending in the State Court of Appeal for the First Appellate District. Appellant is now seeking prohibition against the Appellate Court of California (the District Court of Appeal denied the appeal on December 11, 1967) and the State Supreme Court on the grounds that his trial was a mere farce and a sham, and the State Trial Judge had no jurisdiction to try the case, or that he exceeded jurisdiction by his failure to properly complete the Court at trial commencement, and that the privacy of the deliberation of the jury was invaded by the attorney for the Prosecution, and by another agent of the state, the Public

Defender who had pretended to represent the defense during the trial. Because of the loss of jurisdiction at the trial level in the state court the appellate courts of the state has no jurisdiction upon which to act. However, appellant has sought prohibition chiefly on the grounds that the Appellate Courts of California furnishes no remedy as a matter of law in this case. The following questions have been presented to the Courts of California, and the relief sought therein were denied.

- (1) WHETHER THE STATE COURT VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT BY FORCING APPELLANT TO APPEAR IN PROPRIA PERSONA IN VIOLATION OF THE SIXTH AMENDMENT, CONSTITUTION UNITED STATES.
- (2) WHETHER THE STATE COURT VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES BY DENIAL OF RIGHT TO COUNSEL OF CHOICE WHEREAS THE ABILITY TO RETAIN PRIVATE COUNSEL WAS SHOWN.
- (3) WHETHER APPELLANT WAS DENIED A FAIR TRIAL BY HAVING AN UNPREPARED ATTORNEY FORCED UPON HIM AT TIME OF TRIAL.
- (4) WHETHER THE DELIBERATIONS OF THE JURY MAY BE DISTURBED BY THE ATTORNEY FOR THE STATE INVADING THE PRIVACY OF THE JURY DELIBERATIONS.

Although an appeal was pending in the state court, the state court had jurisdiction to act upon the questions whereby were presented the above questions in a petition for habeas corpus (see In re Johnson. 35 Pac. 2d 225). The District Court

of appeal denied in the issue of counsel on habeas corpus and on appeal; the State Supreme Court denied habeas corpus in all issues which are presented in this appeal-petition. Habeas Corpus will lie to test the legality of a conviction, (see McDonald vs. Moore 353 F. 2d 1065 ex rel Durocher vs. LaVelle, 323 (1964). In re Bartges 42 Cal. 2d____. In re Harinear 29 Cal. 2d 404) therefore the state court of appeal, or the Supreme ~~Justices~~ have held an evidentiary hearing on the matter of appellant's contention especially whereby the Reporter's Transcript bears verity to the appellants contention. (See Reporter's Transcript Pages 1 and 2 which is on exhibit in this Court).

It is well established law that a reviewing court cannot look into matters outside the record (see People v. Lyons 22 Cal. Rptr. 327), and being as the record is silent on the issue of the invasion of the jury room by the agents of the state, direct appeal furnishes no remedy as a matter of law on that particular issue. To deny appellant a chance to be heard on the issue of the invasion of the jury room is a denial of due process and equal protection of the law. Appellant is entitled to be heard on all of the issues which he has presented as violations of his Constitutional rights. Appellant presented sworn affidavits to the United States District Court to the effect of the jury room invasion but that Honorable refuse to grant the relief sought or to explain why appellant was not entitled to be granted the requested relief.

ISSUES PRESENTED HEREIN

- (1) WHETHER THE COURT BELOW ABUSED ITS DISCRETION BY FAILURE TO MAKE A FACTUAL DETERMINATION FOR THE ORDER OF DENIAL OF APPLICATION FOR WRIT OF PROHIBITION.
- (2) WHETHER APPELLANT WAS DENIED A CONSTITUTIONAL RIGHT BY THE DENIAL OF HAVING WITNESSES GIVE TESTIMONY CONCERNING THE INVASION OF PRIVACY DURING THE JURY DELIBERATIONS.
- (3) WHETHER APPELLANT'S CONVICTION AND CONFINEMENT VIOLATES DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT THEREBY APPELLANT HAS ONLY A PARTIAL REMEDY IN THE STATE APPEAL COURTS.
- (4) WHETHER THE AGENTS OF THE STATE (THE JUDGE THE DEPUTY DISTRICT ATTORNEY, AND/OR THE PUBLIC DEFENDER HAD AN OBLIGATION TO REVEAL THEIR PERSONAL KNOWLEDGE THAT ONE OF JURORS SPOKE UNTRUTHFULL WHILE UNDER OATH.

1. ARGUMENT

- a. The Court below did abuse its discretion.

Laws are made to be obeyed by rulers and people. The Court had a duty to make a determination of facts in the order of denial and Rule 52, Fed. Rules Civ. Proc. is holding as well as Rule ____ Local Rules of the Court below. Appellant had petitioner the Court below not as a stalling method, but as a remedy to elicit the truth of the occurrence of the rapid-fire violations of appellant's Constitutional rights by the agents of the state at the trial. Being as the State record is silent

concerning the invasion of the privacy of the jury room during deliberations for the verdict, the Court had a duty to receive testimony from witnesses with reference to the intrusion whereby sworn affidavits by parties who witness the intrusion were presented to the Court. Appellant had moved the Court that the jurors be subpoenaed concerning the invasion, and appellant was legally entitled to have witnesses appear (Rule 45 (e) F.R.Civ.P.) at the hearing for prohibition and the denial of said request was a denial of a fair hearing in the matter in violation of the Sixth and Fourteenth Amendments. California's Constitution Art. section 13 is interpreted to mean that appellant has no remedy unless an entire examination of the entire cause is had whereas an appeal is pending in the state courts. There can be no examination of the invasion without testimony due to the fact that the invasion was not reported. California Court Have held that the jury room shall be occupied by jurors only during the deliberation for the verdict (People vs. Britton 4 Cal. 2d 122; People vs. Brunerant, 4 Cal. App. 2d 75), and the Federal Courts have held that the presence of any person other than the twelve jurors impinges on privacy and secrecy of deliberations jury. (See United States vs. Virginia Errection Corp. 335 F.2d 876.) In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. For that reason, the invasion by the agents of the state was a violation of the right to appear clause of the Sixth Amendment

which is made applicable to the states by the Fourteenth Amendment. Being as appellant was not present while the state agents were inside the jury room, it is fair, and legal, to assume that what occurred at that time was the direct cause for the jury's return of a guilty verdict, and the assumption would have a special effect when considering the fact that the agents entered the jury room to offer evidence, (see *People v. Lowery*, 70 Cal. 123.) The law is established that the Sixth Amendment safeguards the right to a fair trial by an impartial jury, (*Gladden v. Oregon State* No. 31 ____ October Term 1966) and that a person accused of crime has a right to be confronted, (*Shepard v. Maxwell*, 384 U.S. 333, 351; *Pointer v. Texas* 337 U.S. 400). The United States Supreme Court stated in *Turner vs Louisiana*:

"The 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is free judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." 379 U.S. 456, 472-473.

This Court should take notice that the agents of the state has not, and cannot truthfully, denied the contention that the the jury was not one of Constitutional require. The verdict of a jury must not be disturbed, or it will not meet the Sixth Amendment standard of a fair trial. (*Remmer v. United States* 347 U.S. 227, 229; *Mathox v. United States*, 146 U.S. 140, 143; *Gold v. United States*, 77 S.Ct. 378.

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a. Appellant was denied a Constitutional right by the Court's failure to allow witnesses to give testimony in the hearing of the Petition for Writ of Prohibition.

"The All Writs Act 28 USC section 1351 (a) empowers the federal courts to 'issue' all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court (Ex Parte Crane 5 Pet 190 193 8 L ed 92 94 (1831)

(Marshall C.J.) and extends to the potential jurisdiction of the appellate court where an appeal is not then pending may be later perfected." (quoted from Vol 16 L ed 2d 807).

It was stated by the Honorable Mr. Justice Day in the case of McClellan v. Garland 217 U.S. 213 54 L. ed 762 (1910):

"(w)e thing it the true rule that where a case is within the appellate jurisdiction of the higher court a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated. ..."

In Roche v. Evaporated Milk Ass'n 319 U.S. 21, 37 L.ed 1135 at 1139 (1943) Chief Justice Stone stated that the authority of the appellate court "is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. ~~The demand for the writ is not~~

It is obvious that the Court below did not give credence to appellants contention of the invasion of the jury room, nor to the sworn affidavits which were presented. Being as the State has not denied the allegation, the Court below should have allowed witnesses to be subpoenaed to give testimony at the hearing in the matter of the petition for prohibition.

3.

2. The Fourteenth Amendment forbids a conviction which has been acquired in violation of the due process and equal protection clauses of that amendment.

The law is established that each person accused of crime is Constitutionally entitled to have the assistance of counsel at his trial (Sixth Amendment Constitution of United States). the law is also established that the Constitutional require of the assistance of counsel mean that counsel must be adequately /prepared/ prior to trial./ Appellant was forced to proceed to trial with an attorney who was forced upon him, over objection, in the pfesence of the jury members. The record of the trial declare that appellant appeared in propria persona, and the Attorney for the Prosecution claimed that appellant had promised to be in propria persona. However, the record will not support that contention. An attorney, upon motioning that he be allowed to withdraw, stated to the court that he understood that appellant would appear in propria persona, (see Transcript entitled: Transcript of Various Dates Prior to Trial--April 22, 1966) but the attorney could not legally waive appellants' Constitutional

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right to counsel. It was the duty of the court to inquire into the matter of counsel instead of accepting what the attorney said and then later forcing appellant to stand trial without counsel. Appellant has at no time waived his right to counsel, and if the Court was opinionated that appellant's right to counsel could be legally waived by an attorney who was asking to withdraw from the case, appellant should have been told that he could not have counsel of choice at the next hearing. At the commencement of trial appellant did not request that the trial be had on another date, but that he be given a few minutes to retain another attorney who was at that time in the building, and with whom appellant had spoken to that very same day with respect to having him represent ~~he~~. A waiver of counsel was necessary before appellant could legally appear without counsel (Johnson v. Zerbst, 304 U.S. 458, 464), therefore, appellant's had an undisputable right to counsel (Powell v. State of Ala. 287 U.S. 45). Appellant stated to the trial judge that he did not desire the assistance of the Public Defender (RT 2) and the said attorney was told that his services were not desired. Appellant was unconstitutionally deprived of his right to counsel whereas he was not accorded a clearcut explanation of his rights when he indicated to the court that he did not want the assistance of the Deputy Public Defender, but wanted counsel of choice (See Higgins v. Fay 354 F.2d 219 (1966) and for his own protection defendant who wishes to proceed pro se must make request to act as his own lawyer in order to invoke that

right. U.S.C.A. Const. Amend. 6--- United States ex rel Higgins v. Fay supra. If, as the record claim appellant was in proper for trial, appellant was denied his Constitutional right to be represented by counsel which is guaranteed by the Sixth Amendment of the United States Constitution. The Attorney General of California has declared that appellant was represented by counsel at trial despite the record contention that appellant appeared in propria persona. If that is correct, Court-appointed counsel should have been given time to prepare (Joseph vs. United States, 321 F.2d 720), and without time for counsel to prepare, a conviction will not stand, (Townsend vs. Bomar, 351 F.2d 499). Legal representation is not adequate and trial does not meet standard of fundamental fairness if court-appointed counsel is not afforded adequate opportunity to investigate and reflect upon client's case. In Martin vs. Commonwealth of Vir., 365 F. 2d 549, (1966) the Honorable Judge Sobeloff, D.C. Cir. Stated:

"The Court recognizes that in each of these cases (dealing with effectiveness of court-appointed counsel's representation) the facts were different. The appellate courts have insisted that ample time be allowed counsel for preparation. They pointed to possible prejudice in some of the cases, but a showing of actual prejudice is not the basis on which these cases rest. The lack of opportunity for ~~xxxxxxxxxx~~ investigation, reflection, conference, and mature consideration which results from trials of felonies immediately after appointment of counsel provides the basis for granting the writ. *** Courts need not look for specific prejudice. The burden isn't on the petitioner to show that he would profit by a trial in which counsel had more time for preparation. Lack of due process is implicit when a felon is tried immediately after the appointment of counsel. * * * To hold otherwise simply invites courts to continue the procedure that leads to pro forma representation. The State can show no compelling for indicting a felon, appointing counsel, and

trying him all on the same day." (See also Estes vs. State of Texas, 389 U.S. 550)

Appellant shall not go to great lenght to show that court
/counsel / /realize/
/appointed/was not prepared; appellant also/rela~~nd~~ that the
burden is a heavy one. However, the following statement sums
up issue ~~22~~ entirely---quoting Reporter's Transcript:

MR. WEEKS: (Public Defender) May it please the court,
/your/
in view of the fact/you/Honor appointed me to assist the
defendant this morning, obviously I have not had an
opportunity for discovery, and under the circumstances,
before the tapes are played in the court before the jury,
I would respectfully move for discovery and the opportunity
to hear the tapes before that time so that if the District
Attorney___ if your Honor will permit me to listen to
them." RT 13: 10 thru 26.

On another occasion the following was had:

MR. WEEKS: Now, excuse me, your Honor, please, I am a
little bit handicapped. RT 45: 2,3.

The United States Supreme Court stated in Chandler v. Fretag,
348 U.S. 3 , 75 S.Ct. 1:

"It is clear that a defendant in a state criminal trial
has a right, ~~under~~ the due process clause, to be heard through h
his own counsel."

If the court was going to force counsel upon appellant, there
was, by law, an attorney of record and he should have been the
~~attorney~~ forced to represent the defense. The fact that court-

appointed counsel entered the jury room is absolute proof that counsel was in collusion with the attorney for the state to deprive appellee of his right to a Constitutionally fair trial. Appellant is confined in violation of his Constitution rights with respect to the due process and equal protection clause of the Fourteenth Amendment.

4.

a. The agents of the state (Judge, Dep. District Attorney, and the Dep. Public Defender each had knowledge that one juror made false statement on voir dire examination.

One of the questions which was asked the jurors during the voir dire examination was whether or not they (he or she) had relatives or friends who were members of law-enforcement. One juror, Mrs. E. Dorothy Hegerhorst, Mrs. A. Dorothy Hegerhorst, stated as follows:

MR. WEEKS: (RT 24:6) Were you able to hear the questions I asked the other prospective jurors?

A. Yes. Q. If I asked you the same questions your answers would be the same? A. Yes.

MR. WEEKS: Pass for cause.

At RT 23:19 (SUPPLEMENTARY REPORTER'S TRANSCRIPT ON APPEAL) the Court^{/asked/} as Mrs. Hegerhorst: ~~XXXXXXXX~~ "You don't know this man over here, Mr. Hegerhorst? A. Just a little.

Mr. Hegerhorst (it has been learned) is a brother-in-law to Mrs. Hegerhorst; Mr. Hegerhorst is a member of law enforcement and he was on duty as an Officer of the Court*-Court Bailiff--at

the time when the juror made the statement which is false beyond a doubt. The question concerning friends or relatives in law-enforcement had been asked five different times. One juror had some casual acquaintance who were law-enforcement members, and another juror had a neighbor. This was adequately discussed and juror, Mrs. Hegerhorst surely understood what was said. In saying that her answering questions would be the same as the answers which were given by the jurors examined before her, she denied her relationship with her brother-in-law who was by law the same as her brother. It is a human impossibility not to be influenced by what is under your vision over a period of years. Mrs. Hegerhorst is the mother of a grown child and it may therefore be assumed that she has been a member of the Hegerhorst family for at least twenty years---it may not easily be assumed that she knew her brother-in-law "just a little" after being in the same family for such long period of time.

In order to ascertain whether a juror is prejudiced in a particular case it has always been held proper to inquire as to his membership in any political, religious, social, industrial, fraternal, law-enforcement or other organizations whose beliefs or teaching would prejudice him for or against either party to the case. People v. Boyle, 22 C.A. 2d 143 at 145.

What is of importance is the fact that Mrs. Hegerhorst knowingly concealed her relationship. It matters not why she concealed the fact that the Bailiff was her brother-in-law; the agents of the state (Judge, Den. D.A., Dep. P.D.) knew of the relationship and failed to intervene. Therefore each of the

agents of the state became a part of false statement. "A lie is a lie" (Napue v Illinois 360 US 264) and "unfairness or corruption of officers in performance of administrative functions in civil or criminal cases is a violation of the ~~of~~ ~~the~~ Fourteenth Amendment." 98 ALR 2d 411. The agents of the state were duty bound to reveal the information that the juror had spoken falsely.

b.

The agents of the state knew that the Court Bailiff and the juror, Mrs. Hegerhorst should not have been in the jury room at the same time during the deliberation for the verdict, but such did occur. It is likely that said juror voted the way that she thought to be suitable to her brother-in-law.

c.

The agents of the state (Judge, Dep. D.A., Dep. P.D.) were aware that the court-appointed attorney with-held names that were signed upon a document introduced as defendant's exhibit A.

CONCLUSION

The Fourteenth Amendment is a jurisdictional bar against a state depriving a person of life, ~~liberty~~ or freedom without due process of law having been afforded. It cannot be said that appeal furnishes a remedy whereby some contentions cannot be heard being as they dehor the record. Appellant's conviction violates the equal protection and due process clause of the Fourteenth Amendment and for that reason it must be reversed.

Porter D. White
 Porter D. White, In Pro. Per.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE APPLICATION OF)	No. 22479
Porter D. White,)	
Appellant,)	AFFIDAVIT OF SERVICE
)	
AFFIDAVIT OF SERVICE OF MAIL)	OF MAIL

UNITED STATES OF AMERICA)	SS:
STATE OF CALIFORNIA)	
COUNTY OF LASSEN)	

WHEREAS, Porter D. White, Appellant, deposes and says, he is a citizen of the United States, over the age of twenty-one, (21) years, and a party to the within action; his address is the California Conservation Center, Box 2210, Susanville, California.

On the 25th day of January, 1968, petitioner enclosed a true and correct, and duplicated copies of the within:

OPENING BRIEF ON APPEAL

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, placed said envelope in the hands of the proper Institutional Authority for the purpose of depositing the same in the United States Mail at the City of Susanville, County of Lassen State of California with postage thereon fully prepaid, there is delivery service by mail at each of the places so addressed.

(1) The ORIGINAL AND 19 COPIES to: Mr. William B. Luck, Clerk
United States Courts of Appeals, For the Ninth Circuit, Box 547,
San Francisco, California.

(2) 3 COPIES to: Thomas C. Lynch, Attorney General of California,
600 State Building, San Francisco, California.

DATE: January 23, 1968

Subscribed to and sworn to before me this _____ day of _____, 1968.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH GUILLORY,

Petitioner and Appellant,

vs.

LAWRENCE E. WILSON, Warden;
LOUIS S. NELSON, Warden;
STATE OF CALIFORNIA, et al.,

Respondents and Appellees.

No. 22411 ✓

APPELLEES' BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
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Attorneys for Appellees

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH GUILLORY,)	
)	
Petitioner and Appellant,)	
)	
vs.)	No. 22411
)	
LAWRENCE E. WILSON, Warden;)	
LOUIS S. NELSON, Warden;)	
STATE OF CALIFORNIA, et al.,)	
)	
Respondents and Appellees.)	
)	

APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253. Proceedings in forma pauperis were authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On July 9, 1959, appellant was convicted in the Superior Court of Los Angeles County of violating Penal Code section 67 (bribery), was found to have

suffered one prior felony conviction, and was sentenced to imprisonment in state prison for the term prescribed by law (EXHIBIT A). On appeal, the conviction was affirmed on March 16, 1960, by the California Court of Appeal, Second Appellate District, in People v. Guillory, 178 Cal.App.2d 854, 3 Cal.Rptr. 415. A motion to vacate judgment was denied by that court on September 6, 1966.

Applications for writs of habeas corpus were filed in the Superior Court of Marin County: No. 46385 (denied August 25, 1966); California Court of Appeal: No. 1/Crim. 5031 (denied March 30, 1965), No. 1/Crim. 5906 (denied September 16, 1966); and California Supreme Court: No. 10382 (denied October 14, 1966), No. 11595 (denied November 8, 1967).

B. Proceedings in the Federal Courts

Appellant filed in the District Court on October 26, 1966 a petition in forma pauperis for a writ of habeas corpus (RT 1). On September 14, 1967, the petition was denied (RT 24, Exhibit B). On October 27 an order for rehearing was denied, and Judge Carter granted appellant's application for certificate of probable cause and for leave to appeal in forma pauperis (RT 49, Exhibit C). Appellant filed a notice of appeal to this Court on November 6 (RT 53). This Court also denied appellant's petition for mandamus (Misc. No. 3556) on October 3, 1967.

SUMMARY OF APPELLEES' ARGUMENT

The District Court did not abuse its discretion in declining to pass upon an issue not presented to the state courts.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS
DISCRETION IN DECLINING TO PASS UPON
AN ISSUE NOT PRESENTED TO THE STATE
COURTS.

In his petition for rehearing, appellant raised one new matter not presented in his original petition to the District Court or the Courts of California. He alleged that at the time of his arrest, he was suffering from severe withdrawal symptoms as a result of his narcotics addiction, and that he desperately desired more heroin. Because of this desperation, his offer to bribe the police was an involuntary act arising from his awareness that, once arrested, his supply of heroin would be terminated. The District Court declined to pass upon that issue because it had not been previously presented before the State courts (RT 51, Exhibit C); and appellant now contends that that refusal was an abuse of discretion.

Title 28, United States Code section 2254, requires as a condition precedent to federal habeas relief that a State prisoner exhaust the remedies available to him in the courts of the State or demonstrate that the remedies available are ineffective. A State prisoner

seeking post conviction relief in federal court is not entitled to urge contentions not made in the courts of the State. Hughes v. Wilson, 365 F.2d 596 (9th Cir. 1966). See also Boseant v. Fitzharris, 370 F.2d 105 (9th Cir. 1966); and Application of Atchley, 169 F.Supp. 313 (N.D. Cal. 1958). The court noted in Rose v. Dickson, 327 F.2d 27, 28-29 (9th Cir. 1964), that this requirement is predicated upon regard for the sovereignty of the State, consideration of practical efficiency and the realization that the State can grant relief on many bases not available to a federal court.

In Schiers v. People of the State of California, 333 F.2d 173, 175-176 (9th Cir. 1964), where an issue had been presented to the state courts, but the petitioner asserted specific facts relating to that issue for the first time on federal habeas corpus, the court said:

"These facts, if proved, present the constitutional issues of fair trial and due process in a wholly different light from that in which they were presented to the state courts.

"In our judgment the state courts should first be given the opportunity to pass upon these issues in their present form. Accordingly we hold, as to this contention, that

state remedies have not been exhausted."

Similarly, in Thomaston v. Gladden, 369 F.2d 693 (9th Cir. 1966), it was held that since an appellant's new contention was not the substantial equivalent of any which he had theretofore presented to the State court, but presented a materially different problem, he was required to submit it to the State court if the State court would hear it. It was held there that it was proper for the District Court to stay further proceedings in habeas corpus to permit appellant to present the issue to the State court. See also Bowie v. Wilson, 373 F.2d 514 (9th Cir. 1967). Such procedure is, of course, not mandatory and appellant was not prejudiced by the District Court's denial of habeas corpus on this issue. The denial is not on the merits and appellant may again bring the issue in the federal courts after he has exhausted his state remedies.

CONCLUSION

The District Court considered and ruled upon points 1, 2, 3, 5 and 6 raised by appellant in his opening brief in its order denying the petition for writ of habeas corpus (EXHIBIT B), and points 2, 4, 5, 7, 8, 9 and 10 in its order denying a rehearing (EXHIBIT C). With respect to those issues, appellant's opening brief on appeal presents no additional authority or reasoning which requires further discussion here.

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: February 23, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

A handwritten signature in cursive script, reading "Joyce F. Nedde".

JOYCE F. NEDDE
Deputy Attorney General

Attorneys for Appellees

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: February 23, 1968

JOYCE F. NEDDE
Deputy Attorney General
of the State of California

A P P E N D I X

STAY PENDING
Appeal
Rem. 5-19-60

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 107

July 9 1959 Present Hon. CLEMENT D NYE Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs
JOSEPH GUILLORY 209129

Deputy District Attorney J Busch and Defendant with counsel, H Weiss
by D Busby, present. Prior is found to be true. Probation denied.
Defendant is sentenced as indicated. Notice of Appeal is filed.
Stay of execution is granted pending Appeal. No bail on appeal.

Y. Busby,

Whereas the said defendant having been found
guilty in this court of the crime of
BRIBERY (Sec 67 PC), a felony, as charged
in the information and prior conviction having been found true as
alleged, to wit: Sale of Narcotics, a felony, District Court of the
United States, Northern District of California, November 5, 1955
and served a term in the Federal Prison

C. I. M.
1960 MAY 25 PM 2:18
G.C. ADMITTANCE

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprison-
ment in the State Prison for the term prescribed by law.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County
of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the Califor-
nia State Prison at Chino.

This Minute Order has been

entered on JUL 14 1959

HAROLD J. OSTLY, County Clerk and Clerk of
the Superior Court of the State of California, in
and for the County of Los Angeles.

By M. L. Miller Deputy

Prob.	Aud.	DMV
LAPD	Cshr.	CYA
CO. J.	Juv.	C Clk.
Sher.	Psyc.	Misc.

MINUTES - State Prison

THE WITHIN INSTRUMENT IS
CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE.
ATTEST:

CALIFORNIA STATE PRISON
AT SAN QUENTIN
BY [Signature]
RECORDS CLERK

(AFFIX SEAL)

FILED

SEP 14 1967

JAMES P. WELSH, Clerk

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT,
OF CALIFORNIA

JOSEPH GUILLORY,

Petitioner,

v.

LAWRENCE E. WILSON, Warden,
et al.,

Respondents.

No.

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

47842

Upon reading the affidavit of Joseph Guillory in forma pauperis it is hereby ORDERED that petitioner be allowed to file his petition for writ of habeas corpus without prepayment of fees.

Petitioner is seeking a writ of habeas corpus. He is presently incarcerated in San Quentin pursuant to a conviction for violation of California Penal Code § 67, bribery. Petitioner was represented by counsel at all stages of the proceedings and entered a plea of not guilty. He attacks the validity of his conviction on numerous grounds.

Petitioner alleges that certain evidence that was a product of an illegal search and seizure was improperly used at his trial against him. Mapp v. Ohio, 367 U.S. 643 (1961) established the rule that it is unconstitutional for evidence that is the product of an illegal search and seizure to be used in a state court as evidence against a defendant. However,

1 in Linkletter v. Walker, 381 U.S. 618 (1965) the United
2 States Supreme Court declined to give the rule established in
3 the Mapp case, supra, retroactive application. Thus since
4 petitioner's conviction was final before the date of Mapp v.
5 Ohio, supra, it is not subject to attack because of the use
6 of evidence gained from an illegal search and seizure.

7 Petitioner argues that the bribery statute under which
8 he was convicted is unconstitutionally vague. The constitutional
9 requirement of definiteness is violated only by a criminal
10 statute that fails to give a person of ordinary intelligence
11 fair notice that his contemplated conduct is forbidden by
12 the statute. Bouie v. City of Columbia, 378 U.S. 347 (1964).
13 The bribery statute under which petitioner was convicted
14 complies with this standard.

15 Petitioner alleges that he was denied a speedy trial.
16 However, he fails to allege that he previously raised any
17 objection to any delay, and he fails to allege that he was
18 prejudiced in any way. Thus the allegation is entirely
19 conclusory and without substance.

20 Petitioner alleges that his right to be protected from
21 self incrimination was violated. Petitioner argues that
22 because he was illegally arrested after forcible entry of his
23 premises by the arresting officers, the bribe offer to police
24 following this incident was coerced. This is not a logical
25 proposition, and petitioner alleges no additional facts to
26 support it.

27 Petitioner alleges that he was not given adequate
28 representation by counsel at his trial. One fact alleged in
29 this regard is that his lawyer failed to deal with petitioner's
30 inability to hear the trial proceedings due to a hearing
31 problem he was having. He alleges that his lawyer failed to
32 adequately inform the judge of the problem and that he failed

1 to take adequate steps to correct the situation.

2 However, petitioner admits that his lawyer brought the
3 problem to the attention of the court at the beginning of the
4 trial and saw to it that petitioner was seated near the witness
5 box to be better able to hear the testimony. Petitioner argues
6 that his counsel failed to postpone the trial proceedings
7 until he could get a battery for his hearing aid and failed
8 to check periodically on whether petitioner was in fact able
9 to hear from his new position in the courtroom.

10 Petitioner also alleges that his counsel failed to
11 object to the introduction of certain hearsay evidence and
12 to the delay in the bringing of the bribery charges.

13 None of these allegations if true would indicate an
14 inadequacy of counsel of constitutional proportions. Petitioner
15 does not allege facts which would indicate that his counsel
16 failed to render reasonably effective assistance and that
17 upon the whole course of the proceedings there was a denial
18 of fundamental fairness. Brubaker v. Dickson, 310 F.2d 30
19 (9th Cir. 1962).

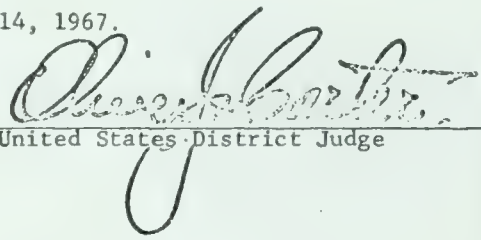
20 Petitioner argues that he was denied a fair trial under
21 his constitutional right to due process because the trial court
22 failed to protect his right to hear the proceedings, and failed
23 to ascertain that petitioner was able to hear the proceedings.
24 Petitioner implies, without specifically alleging, that he was
25 not able to hear some of what was being said at his trial.

26 This issue was raised on appeal before the District
27 Court of Appeal of California. People v. Guillory, 178 C.A.2d
28 854, 3 Cal. Rptr. 415 (1960). That court carefully reviewed
29 the entire record of the trial proceedings and determined that
30 petitioner " ... had a fair and considerate trial." People v.
31 Guillory, supra, 178 C.A.2d at 862. Before relief can be
32 granted on a writ of habeas corpus, this Court would have to

1 find that the trial judge in dealing with petitioner's inability
2 to hear the proceedings abused his discretion and acted in an
3 arbitrary and capricious manner. See 21 Am. Jur. 2d, Criminal
4 Law, § 338 (1965). In view of the finding of the District Court
5 of Appeal of California that the trial judge did not abuse
6 his discretion and did not act arbitrarily and capriciously,
7 and in view of the failure of petitioner to allege any extra-
8 ordinary matters not considered by that court, this Court is
9 not required to provide a forum for further, repetitious legal
10 proceedings, and declines to do so. 28 USC § 2254(d).

11 Accordingly, it is hereby ORDERED that this writ of
12 habeas corpus must be, and is hereby denied.

13 Dated: September 14, 1967.

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16 United States District Judge
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FILED

OCT 27 1967

JAMES P. WELSH, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

JOSEPH GUILLORY,

Petitioner,

v.

LAWRENCE E. WILSON, Warden,
LOUIS S. NELSON, Warden; STATE
OF CALIFORNIA, et al.,

Respondents.

No. 47842

ORDER SUBSTITUTING
RESPONDENT; ORDER DENYING
REHEARING; AND ORDER
GRANTING CERTIFICATE OF
PROBABLE CAUSE AND PER-
MISSION TO APPEAL IN
FORMA PAUPERIS

This case is before the Court on a motion for a rehearing and in the alternative a petition for certificate of probable cause for appeal in forma pauperis, and a motion for substitution of the respondent.

Upon motion of the petitioner and under Rule 25d, F.R.C.P., IT IS ORDERED that Louis S. Nelson be substituted as respondent in this action.

Petitioner, in his motion for rehearing, argues that he was convicted under a law, California Penal Code § 67 (offering a bribe to an executive officer of the State of California), which is unconstitutional as a bill of attainder. There is nothing in § 67 which restricts its operation to named individuals or a named group. Accordingly this attack is without merit. United States v. Brown, 381 U.S. 437 (1965).

*Copies mailed
To A.G. & Petitioner
10-27-67
STC*

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1 Contrary to petitioner's claim that California Penal
2 Code § 67 does not apply to people who are not an officer of
3 the State of California, this section applies to "Every person
4 who gives or offers any bribe ..." (Emphasis added).

5 Petitioner in raising search and seizure claims
6 argues that his conviction "may not" have been "final" before
7 Mapp v. Ohio, 367 U.S. 643 (1961) within the definition of
8 Linkletter v. Walker, 381 U.S. 618 (1965), (see fn. 5).

9 From the original petition in this case it is learned that
10 petitioner had one appeal from his conviction before the
11 District Court of Appeal of California, and its decision
12 affirming conviction was announced on March 16, 1960. People
13 v. Guillory, 178 C.A.2d 854, 3 Cal. Rptr. 415 (1960). There
14 is no indication either in petitioner's petition or in the
15 official reporter that further review was sought. Accordingly
16 petitioner's conviction became final under the Linkletter
17 finality rule when the time within which the Supreme Court of
18 California could grant a hearing expired, or sixty days after
19 the filing of the decision by the District Court of Appeal.
20 Rule 28a, Calif. App. R. of Ct.; Witkin, Calif. Crim. Proc.,
21 § 733 (1963). Thus petitioner's conviction was final well
22 before the Mapp case, supra, was decided.

23 Petitioner next claims that a statute such as
24 California Penal Code § 67 is unconstitutional under the
25 first amendment protection of speech because one of its
26 necessary elements comes from the spoken words in a bribe
27 offer. The first amendment does not protect all speech.
28 See Cox v. Louisiana, 379 U.S. 536, 555 (1965). The words
29 offering a bribe are not protected speech.

30 Petitioner suggests that this Court misinterpreted
31 his allegations that he did not hear the proceedings at his
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1 trial and that therefore he could not effectively exercise
2 his right to confront witnesses against him. This Court's
3 previous order dealt with this contention at length, and
4 the reasoning and holding there are sufficient to cover
5 even an allegation that he heard nothing at all.

6 Petitioner is concerned that the undersigned judge
7 is prejudiced against him outside the merits of his petition
8 for writ of habeas corpus. His only basis for this feeling
9 is the fact that his petition was ruled on by this Court while
10 he had a petition for a writ of mandamus before the Court of
11 Appeals for the Ninth Circuit. One of petitioner's suggestions
12 for curing this prejudice is for this Court to grant a
13 certificate of probable cause so he can appeal this Court's
14 order in forma pauperis. Since this Court is inclined to
15 grant this for other reasons, no further disposition of the
16 matter is needed.


17 Petitioner raises one new matter not presented in the
18 first petition to this Court or to the courts of California.
19 He alleges that at the time of his arrest he was suffering
20 from severe withdrawal symptoms as a result of his narcotics
21 addiction, and that he desperately desired more heroin, and
22 that because of this desperation his offer to bribe the
23 police was an involuntary act arising from his awareness that
24 once arrested his supply of heroin would be terminated. Since
25 this issue has not been previously presented before the state
26 courts by petitioner, it will not be passed upon by this
27 Court. 28 USC § 2254(b).

28 Accordingly, IT IS ORDERED that petitioner's motion
29 for a rehearing be, and the same is hereby denied.

30 In view of this Court's opinion that this petition
31 is not entirely frivolous, IT IS ORDERED that a certificate
32 of probable cause for appeal is hereby granted.

1 Upon reading the affidavit of Joseph Guillory, in
2 forma pauperis, IT IS ORDERED that said petitioner be, and he
3 is hereby allowed to appeal in forma pauperis to the Court
4 of Appeals for the Ninth Circuit without the prepayment
5 of fees and costs, or security therefor, from the order of
6 this Court dated September 14, 1967, denying his petition
7 for a writ of habeas corpus, and the order today denying
8 a rehearing.

9 Dated: October 27, 1967.

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13 United States District Judge
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